FILE COPY

In the Supreme Court of the United States

No. [redacted] 125

OCTOBER TERM, 1958.

HENRY H. PLEASANT,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

EDWIN F. WOODLE,
Keith Bldg., Cleveland, Ohio,

WILLIAM J. CORRIGAN,
Williamson Bldg., Cleveland, Ohio,

CHARLES J. SMITH,
Leader Bldg., Cleveland, Ohio,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO	1
Opinion by Court Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	5
Statement of the Case	8
Argument	25
Summary	25
The Separation of Powers in Ohio	27
Prior Ohio Court Decisions on Attorneys and the Practice of Law	31
Question of the Inherent Powers of a Court With Respect to Attorneys	33
Limitation Upon the Inherent Powers of the Court	44
The Question Relating to the Grounding of the Complaint Against Petitioner Upon an Invalid Judgment of the Supreme Court of Ohio	47
The Question Relating to the Invalidity of Rule 27 of the Supreme Court of Ohio	53
Conclusion	55
APPENDIX (Attached):	
Rule XXVII of the Supreme Court of Ohio	1a
Complaint Filed in Instant Case	16a
Opinion of the Supreme Court of Ohio in Wright Case	17a
Opinion of the Supreme Court of Ohio in Instant Case	31a
Journal Entry of the Supreme Court of Ohio	45a

TABLE OF AUTHORITIES.

Cases.

Applicants for License, In Re, 143 N. C. 1 47

Bar Association v. Pleasants, 167 O. S. 325 ..... 2, 23, 24, App. 31a

Board of Commissioners of Montgomery County vs. Cooper's Unknown Heirs, 50 Ohio Law Abs. 20, 75 N. E. 2d 84, Appeal Dismissed 152 O. S. 202, 88 N. E. 2d 293 51

Garland, Ex Parte, 71 U. S. 333 46

Hawke, In Re, 107 O. S. 341, 140 N. E. 583 ..... 31, 37

Kennard vs. Kennard, 35 O. S. 660 50

Lieberman, In Re, 163 O. S. 35, 125 N. E. 2d 328 33

McBride, In Re, 164 O. S. 419, 132 N. E. 2d 113 ..... 38, 39, 40, 41

Middletown, The City of, vs. City Commissioner of Middletown, 138 O. S. 596, 37 N. E. 2d 609 50

Morris, Ex Parte, 8 O. C. C. N. S. 212, 18 O. C. D. 611; 77 O. S. 598, 48 N. E. 1129 ..... 44, 45

Ohio Contract Carriers Association vs. Public Utilities Commission, 140 O. S. 160, 42 N. E. 2d 758 50

State ex rel. Joseph vs. Crossland, Judge, 152 O. S. 199, 88 N. E. 2d 289 32

State ex rel. Levy vs. Savord, Judge, 143 O. S. 451, 55 N. E. 2d 735 32

Strong, Edward P., In the Matter of, 27 O. C. C. n.s. 257, 29 O. C. D. 81 ..... 35, 36

Thatcher, In Re, 80 O. S. 492, 89 N. E. 39 ..... 33, 34, 36

Wright, In re Estate of, 165 O. S. 15 ..... 10, 12, 20, 22, 48, 49, 52, App. 17a

Texts.

121 *A. L. R.*, pp. 215 to 294 46

3 *C. J. S.* 1051 51

2 *Ohio Jurisprudence*, 2d 388 51

2 *Ohio Jurisprudence*, 2d Series, page 757 50

Constitutions.

Constitution of the United States:

Art. IV, Sec. 4 ..... 2, 5, 28

Fourteenth Amendment 3, 5

Constitution of Ohio:

Art. I, Sec. 20 27

Art. II, Sec. 1 ..... 5, 28

Art. IV, Sec. 1 5

Art. IV, Sec. 2 5

Art. IV, Sec. 4 ..... 6, 30

Statutes and Rules.

Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. C. Sec. 1257 2

Ohio Revised Code:

Sec. 2113.36 23

Chap. 2705 44

Sec. 4705.02 ..... 6, 30

Sec. 4705.03 ..... 7, 18, 54

Sec. 4705.04 7

Sec. 4705.05 7

Rule 27 of the Supreme Court of Ohio ..... 13-18, 40, 41, 53, App. 1a

In the Supreme Court of the United States

No.

OCTOBER TERM, 1958.

HENRY H. PLEASANT,

Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner, Henry H. Pleasant, prays that a writ of certiorari issue to the Supreme Court of the State of Ohio, to review the decision and the judgment of that court and the order denying petitioner's application for rehearing, in the case of the Cleveland Bar Association vs. Pleasant, docketed as case No. 1 on the Disciplinary Docket of said court. Said judgment confirmed findings of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, declaring that the petitioner had violated Canons 6, 29, 32 and 38 of the Canons of Professional Ethics, and suspended petitioner indefinitely from the right to practice law in the State of Ohio. Said judgment was rendered on March 5, 1958 and petitioner's application for rehearing, duly filed, was denied on March 26, 1958.

OPINION BY COURT BELOW.

The only court which considered and passed upon the questions here presented was the Supreme Court of Ohio. Its opinion is reported in 167 O. S. 325 and is printed in the Appendix hereto, pages 31a-44a.

JURISDICTION.

Jurisdiction to review the aforesaid judgment and order is conferred on this Court by the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. C. Sec. 1257. The portion of that section pertinent to jurisdiction in this review provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) by writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Supreme Court of Ohio violate the guarantees afforded to the petitioner, as a citizen of the United States, of a separation of powers between the Legislative and Judicial branches of the Government of the State of Ohio, under Article IV, Sec. 4 of the Constitution of the United States—

(a) By devising and promulgating a method of procedure for the hearing and determination of disciplinary complaints against attorneys, wholly contrary to and inconsistent with the procedure provided for the same purpose by statute?

(b) By promulgating a rule creating a Board of Commissioners on Grievances and Discipline, and declaring that all disciplinary complaints against attorneys must be filed with and must be heard only by

such board, contrary to and in violation of a statute of the State of Ohio providing that jurisdiction to hear and determine such complaints is conferred upon the Supreme Court, the Courts of Appeals and Courts of Common Pleas of Ohio, and providing for the filing of complaints with such courts and the method of trial of such complaints by such courts?

(c) By completely and effectively nullifying the statutes of Ohio providing the procedure for the filing of disciplinary complaints against attorneys, the hearing and determination of such complaints and the review thereof by appellate courts, while at the same time refusing to declare such statutes to be unconstitutional, void or beyond the power of the Legislature to enact?

(d) By incorporating in a rule of court creating a Board of Commissioners on Grievances and Discipline, a provision directing the assessment of costs against the petitioner in this case when the assessment of costs in Ohio is, and always has been, exclusively a matter of legislative jurisdiction; and by undertaking to assess against the petitioner in this case costs in the amount of $797.08, contrary to all existing statutes on the subject of costs and without any legal authority therefor.

2. Did the Supreme Court of Ohio deprive the petitioner of his constitutional rights, without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States—

(a) By requiring a disciplinary complaint against him to be filed with a Board of Commissioners on Grievances and Discipline, and by providing further that such board shall be vested with the exclusive right to hear witnesses and to receive evidence with respect to such complaints?

(b) By providing that the petitioner's appearance to defend himself against such complaint, as a matter of right, shall be before such board only and

not before any court or in the presence of any judge, excepting only as a matter of grace before the Supreme Court of Ohio for the purpose of objecting to the findings and the decision of the board?

(c) By providing that no person who is a member of the bar of the same county in which the petitioner practices law may sit in any hearing to receive evidence with respect to such complaint; and that evidence may be received only by persons who are not residents of the county in which the petitioner conducts his practice?

(d) By providing for a Board of Commissioners on Grievances and Discipline consisting of 17 members, and conferring upon such board the power to determine whether the petitioner was guilty of misconduct, but at the same time providing that the petitioner shall have the right to appear only before 3 members of that board and that the petitioner at no time may appear in person, or by counsel, before the Board of Commissioners, either prior to or after its determination of the complaint made against him.

(e) By confirming the grounding of a complaint against the petitioner upon a decision previously rendered by the Supreme Court of Ohio in a case which that court had no jurisdiction to hear or determine?

(f) By confirming disciplinary action against the petitioner recommended by the Board of Commissioners on Grievances and Discipline, upon the basis of a complaint which failed to inform the petitioner specifically of any act of misconduct with which he was charged, and which failed to charge the petitioner with the violation of any of the Canons of Ethics by which his conduct is governed?

(g) By setting up and defining as the basis of its judgment a standard of conduct required of the petitioner as an attorney at law, and a rule of law, which standard of conduct and which rule did not exist until pronounced by the court in this case; and

by applying such standard and such rule to acts of the petitioner which took place nine years earlier; and by virtue of such retroactive application divesting the petitioner of a valuable right and privilege, namely, the right to continue to practice law as a member of the bar of the State of Ohio?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States:

ARTICLE IV, Sec. 4—"The United States shall guarantee to every state in this Union a Republican form of government * * *"

AMENDMENT 14—"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Ohio:

ARTICLE II, SEC. 1—"The legislative power of the state shall be vested in a general assembly consisting of a Senate and House of Representatives * * *"

ARTICLE IV, SEC. 1—"The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, Courts of Probate, and such other courts inferior to the Courts of Appeals as may, from time to time, be established by law."

ARTICLE IV, SEC. 2, The Supreme Court—

"It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo and appellate jurisdiction in all cases involving questions arising under the Constitution of

the United States or of this state in cases of felony on leave first obtained, and in cases which originated in the Courts of Appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. * * * In cases of public or great general interest, the Supreme Court may, within such limitations of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the Court of Appeals."

ARTICLE IV, SEC. 4—

"The jurisdiction of the Courts of Common Pleas and of the judges thereof, shall be fixed by law."

Ohio Revised Code:

REVISED CODE SEC. 4705.02, Suspension or removal of an attorney—

"The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude. Such suspension or removal shall operate as a suspension or removal in all the courts of the state. The clerk of court upon such suspension or removal shall send a copy thereof to the supreme court, the court of appeals, and to the federal court of the district in which said attorney resided at the time of trial for such action as is warranted. Judges of such state courts are required to cause proceedings to be instituted against an attorney, when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal, or reprimand."

REVISED CODE SEC. 4705.03, Proceedings against attorney—

"Before an attorney at law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel."

REVISED CODE SEC. 4705.04, Review of proceedings.

"In case of suspension or removal of an attorney at law by the court of common pleas, an appeal on questions of law may be had to the court of appeals, and the sentence of either the court of common pleas or the court of appeals, may be reviewed on appeal on questions of law in the supreme court. If such suspended or removed attorney shall desire a modification of the decree of suspension or removal, he shall file a written motion therefor in the court which entered such decree."

REVISED CODE SEC. 4705.05, Expenses and costs.

"The court in which charges or written motion is filed in accordance with sections 4705.03 and 4705.04 of the Revised Code, shall allow to the persons appointed to file and prosecute the charges, or to resist the modification of any decrees, for their services in either case, a reasonable sum, not exceeding one hundred dollars, to each person, together with the costs and expenses incurred by him in such proceedings. The amounts allowed shall be paid from the county treasury of the county wherein such proceedings are had, upon the warrant of the county auditor. If such charges or motion is filed in the supreme court, such allowances shall be paid from the state treasury."

STATEMENT OF THE CASE.

The petitioner is an attorney at law, 55 years of age. He is a graduate of the Law School of Western Reserve University in Cleveland, and was admitted to the Bar of Ohio in 1931.

The alleged "misconduct" of the petitioner giving rise to this proceeding took place in 1949 when the petitioner was appointed by the Probate Court of Cuyahoga County in Cleveland as administrator of the estate of one William A. Wright.

The "misconduct" with which the petitioner has been charged does not involve the appropriation or misappropriation of funds, solicitation of business, or any of the acts of malfeasance or of misfeasance which generally constitute the basis of a complaint against a member of the bar.

The basis of the charge in this case is the failure of the petitioner to "report" to the Probate Court the receipt from a client of fees for services rendered by the petitioner. The client was the sole heir of the estate of which the petitioner was the administrator, and the fee was paid to the petitioner after the assets of the estate had been distributed to the heir.

William A. Wright died in February of 1949. The petitioner was notified of his death by four persons who were second cousins of the decedent and who were then his only known heirs. They agreed to the appointment of the petitioner as administrator of the estate. Subsequently the petitioner was contacted by one William Wright who claimed to be a first cousin of the decedent. As a result of efforts of the petitioner evidence was produced which established William Wright to be a first cousin and, therefore, the sole heir of the decedent under the law of Ohio.

A petition for determination of heirship was filed by the petitioner and the determination was made by the Probate Court upon the basis of evidence procured by the petitioner. The chief asset of the estate consisted of certain real property, and proceedings to sell that property were brought by the petitioner in the Probate Court pursuant to Ohio law. The property was sold and, after payment by the petitioner of bills and costs of administration, the entire amount remaining on hand was turned over to William Wright, the sole heir.

An agreement was made between the petitioner and the heir for payment to the petitioner by the heir of a stipulated fee. This fee, in the amount of $1444.84, was paid by the heir forthwith upon receipt of distribution to him of the assets of the estate.

The petitioner, as administrator, filed with the Probate Court a final account disclosing distribution of the entire estate to the heir. The account did not list receipt by the petitioner of any attorney fee; or of any payment from the estate except compensation as an administrator in the amount of $235.00, a sum which is fixed by statute and not subject to the discretion of the court. The judge to whom this accounting was made was Judge Nelson J. Brewer, then the only member of the Probate Court of Cuyahoga County.

More than four years after the final account had been filed, Judge Brewer's successor, Judge Walter Kinder, undertook the appointment of a committee to investigate this estate and caused a complaint to be issued against the petitioner charging him with fraud in failing to report the receipt by him of an attorney fee from William Wright, the sole heir of the estate. Mr. Wright himself made no complaint of any kind. He was contacted during the course

of the investigation, indicated that he was satisfied with the petitioner's services, satisfied with the fee he had paid, and had subsequently employed the petitioner in other matters.

Thereafter, Judge Kinder, who had instigated the complaint against the petitioner, held that he had been guilty of fraud upon the court and adjudged him to be in contempt. The petitioner appealed from that finding, and the Court of Appeals of Cuyahoga County, an intermediate appellate court, affirmed the Probate Court's decision with respect to an order directing the petitioner to refund to the estate the administrator's fee received by him, but reversed the Probate Court on its finding that the petitioner had been guilty of contempt.

In the Court of Appeals the petitioner's appeal was opposed by a "committee" of three attorneys who had been appointed by the Probate Court as amici curiae to represent the court on the appeal. The probate judge was not satisfied with the result of the appeal and instructed the three attorneys, who had been appointed by him as amici curiae, to prosecute an appeal to the Supreme Court of Ohio.

In accordance with these instructions, the three attorneys filed a motion in the Supreme Court to certify the record in the case, which that court granted. Thereafter, the Supreme Court of Ohio rendered a decision and a judgment in the case entitled, *In re Estate of Wright*, affirming in all respects the decision and the orders of the probate court. This decision of the Supreme Court of Ohio is reported in 165 O. S. 15, and is reproduced in the Appendix, pages 17a-30a, *infra*.

Thereafter, the decision of the Supreme Court of Ohio in the case of *In re Estate of Wright*, was made the basis for the complaint against the petitioner in the instant

proceeding. In its opinion in that case the Supreme Court of Ohio stated:

> "The cause is before this court by reason of the allowance of a motion to certify the record, which motion was filed by Jack A. Persky, Victor DeMarco and John R. Kistner, amici curiae, by appointment by Walter T. Kinder, Judge of the Probate Court of Cuyahoga County. No cross appeal was filed by appellee * * *"

Under the law of Ohio, no appeal can be instituted in any case by amici curiae. That fact was overlooked by counsel then representing the petitioner and apparently by the members of the Supreme Court as well, so that the case was argued before the court and decided by the court on its merits.

Subsequently, after the filing of the complaint in the instant case, a motion was filed with the Supreme Court of Ohio to vacate the judgment entered by that court in the matter of the estate of Wright. The motion pointed out that the court had no jurisdiction of that cause for the reason that there was no party appellant in the case, no party who had been aggrieved by the judgment of the Court of Appeals and no party in whose favor the Supreme Court of Ohio could act. The Supreme Court of Ohio refused to consider this motion on its merits, but entered an order declaring that it would be regarded as a second application for rehearing of the cause, and overruled the motion summarily.

Thereafter, a motion for reconsideration of the court's ruling was sought to be filed for the obvious reason that the petitioner was not seeking a rehearing of the cause before the court, but a dismissal thereof. The Supreme Court of Ohio instructed the clerk not to accept or to file the motion for reconsideration.

Thereupon, the petitioner prepared and forwarded to the clerk, for filing, a petition to vacate the judgment in the *Wright* case. Again the Supreme Court of Ohio instructed the clerk not to file the petition. The clerk of the Supreme Court mailed the petition, together with the deposit which had been tendered, not to counsel in the case but to the printing company.

Much disturbed by this arbitrary action of the court, counsel for the petitioner prepared another petition to vacate the judgment of the Supreme Court of Ohio for lack of jurisdiction in the *Wright* case, and made a trip to the state capitol for the sole purpose of seeing to it that the petition would be duly filed. Upon personal presentation by counsel, the clerk accepted and filed the petition; summons has been issued thereon; no answer or other action opposing the granting of the petition has been taken by anyone; the petition to vacate is still pending; and the Supreme Court of Ohio has to this date refused to hear the same.

Since the year 1824, consecutively for a period of 133 years, the law of Ohio establishing the procedure to be followed in connection with disciplinary matters involving attorneys was governed by statute. During that entire period the statutory procedure was substantially unchanged.

The statutes, which were in full force and effect when the complaint in this case was filed, provided that—

> "The Supreme Court, Court of Appeals or Court of Common Pleas, may suspend or remove an attorney at law from office, or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude."

"Before an attorney at law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of the complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him."

In accordance with the statutory jurisdiction which existed for so long a period, it was the universal practice in the State of Ohio to file in the Common Pleas Court of the appropriate county any complaint which it was desired to bring before a court regarding the conduct of an attorney. And during the entire period of 134 years only one complaint was filed directly and as a matter of original jurisdiction with the Supreme Court of Ohio, and determined in the year 1909.

On December 5, 1956, the Supreme Court of Ohio announced the adoption of a new rule of court, designated as Rule 27, to become effective January 1, 1957. The rule, which is quite lengthy, and is printed in the Appendix hereto, pages 1a-15a, created a Board of Commissioners on Grievances and Discipline. The rule provides in part as follows:

"There is hereby created as commissioners of this court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, make findings and submit recommendations to this court, as hereinafter provided, (a) concerning complaints of misconduct as hereinafter defined, which are alleged to have been committed by any attorney or counselor at law or judge * * *. Said Board of Commissioners shall consist of 17 members of the bar of this court, appointed by this court.

"The rule provides for the appointment of one member for each of 17 districts into which the state is

arbitrarily divided in connection with the operation of the affairs of the Ohio State Bar Association, a private bar association in the State of Ohio. Under this division made by the Ohio State Bar Association there is one district comprising one county only. The remaining 87 counties of the state are divided among the remaining 16 districts.)

"From and after the effective date of this rule, all proceedings for the investigation of complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges, all proceedings for the discipline of such attorneys and counselors at law and judges, and all proceedings for reinstatement as an attorney and counselor at law, shall be brought, conducted and disposed of in accordance with the provisions of this rule. * * *

"All such complaints shall be filed in quadruplicate in the office of the Secretary of the Board of Commissioners.

"If said Board of Commissioners finds that the complaint upon its face does not charge misconduct, as herein defined, such complaint shall be dismissed, otherwise, said secretary forthwith shall cause a copy of such complaint to be sent by registered mail to the respondent named therein with a notice requiring him to file, within twenty days after the mailing of such notice, his answer in quadruplicate. * * *

"After respondent's answer has been filed, or the time has expired within which respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of commissioners appointed by the chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes."

The rule then provides that if the panel finds the respondent guilty of misconduct and desires to administer a private reprimand, this may be done without any right of appeal, review, or rehearing accorded to the respondent, and the finding of the panel becomes a permanent mark against the record of the respondent.

The rule further provides that if the panel finds that the respondent is guilty of misconduct and determines that a suspension or disbarment "is merited," the panel certifies its finding to the entire Board of Commissioners with the record of the testimony taken.

There is no provision in the rule for an appearance before the board of either the respondent or his counsel. In this case neither the respondent nor his counsel were permitted to appear before the board. There is no provision in the rule for the filing of a brief with the board, but in this case petitioner's counsel was permitted to file such a brief.

The rule provides that if the board determines that a public reprimand, suspension or disbarment is merited, the board shall—

> "Thereupon make a final certified report of such proceedings including its finding of fact and recommendations and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the clerk of this court, and shall forthwith notify the respondent and all counsel of record of such action * * *
>
> "Upon the filing of such final report by the Board of Commissioners, this court shall issue to the respondent an order to show cause before this court, at a time to be specified, not less than forty days after the issuance of such order, why the report of said

Board of Commissioners shall not be confirmed and a disciplinary order entered. * * *."

The respondent is then given an opportunity to file "objections" to the finding and the recommendation of the board and a brief in support of such objections. The rule then provides—

> "Upon failure of respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the same, and after hearing, if requested by this court, this court shall enter such order upon the matter as it may find proper, which may include such provision for reimbursement of the actual and necessary expenses incurred by the Board of Commissioners in connection with such proceedings as the court shall deem just."

Under the provisions of this rule of the Supreme Court of Ohio, the action of the Board of Commissioners making a finding against an attorney and recommending suspension or disbarment, may be entered by only five members of the board. The rule provides—

> "A majority of the members of the Board of Commissioners, or of a hearing panel, shall constitute a quorum for all purposes, and the action of the majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel."

The meeting and the deliberations of the commissioners are not a matter of public record. Accordingly the petitioner is unable to state whether more than five of the seventeen members of the Board of Commissioners concurred in the finding and recommendation subsequently approved by the Supreme Court of Ohio.

Pursuant to the provisions of the foregoing rule, a complaint was filed with the Board of Commissioners on Grievances and Discipline by the Cleveland Bar Association. The entire complaint is as follows:

> "Now comes the Cleveland Bar Association, the relator herein, and says that Henry H. Pleasant, the respondent, has been guilty of misconduct within the meaning of Rule 27, par. 5 of the Supreme Court of Ohio, as more specifically set forth in the case of In Re Estate of Wright, 165 O. S. 15. Wherefore, relator prays that the respondent be served with notice of this complaint and a hearing be held within the terms of Rule 27 of the Supreme Court of Ohio."

Paragraph 5 of Rule 27 referred to in the foregoing complaint is quoted in full herewith—

> "Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics, or the Canons of Judicial Ethics, as adopted by the court from time to time, or the commission or conviction of a crime involving moral turpitude."

The case filed against the petitioner herein was the first case to be filed with the Board of Commissioners on Grievances and Discipline, and was docketed as case No. 1 on the Disciplinary Docket of the Supreme Court of Ohio.

The petitioner moved to dismiss the complaint upon the ground that the board had no jurisdiction to consider or to determine the same. In support of that motion the petitioner raised, among other important legal questions, all of the constitutional questions affecting the validity of the composition and the existence of the board, and the validity and the constitutionality of the rule which created that board which are presented herewith.

In order to preserve all rights to which he was entitled under the law, the petitioner declined to submit himself voluntarily to the jurisdiction of the board. The board, however, refused to consider or to determine the petitioner's motion to dismiss the complaint until after a panel had been selected, notice of hearing issued and the hearing had actually begun.

Following the formal opening of the hearing of the complaint filed against the petitioner, the panel announced that petitioner's motion to dismiss the complaint for lack of jurisdiction in the Board of Commissioners was overruled "so far as it was within the authority of the panel to overrule it."

At this point the petitioner pointed out to the panel that the complaint itself was insufficient, since the provisions of Revised Code of Ohio, Sec. 4705.03 required the filing of written charges "stating distinctly the grounds of complaint."

Petitioner pointed out that the complaint in this case was couched in the most vague and general terms, to wit—"that the respondent has been guilty of misconduct within the meaning of Rule 27, par. 5 of the Supreme Court of Ohio"; that Rule 27 par. 5 defined misconduct as any violation of any provision of the oath of office taken upon admission to the practice of law in Ohio, or any violation of any of the Canons of Professional Ethics.

It was pointed out to the panel that the complaint did not state whether the petitioner was being charged with a violation of his oath as an attorney and, if so, what part of the oath, and did not state whether the petitioner was being charged with a violation of the Canons of Professional Ethics, the same being 36 in number and, if so, which one or more of the Canons of Ethics the petitioner was charged with having violated.

It was pointed out to the panel that the petitioner was charged with "misconduct," "as more specifically set forth in the case of In Re Estate of Wright, 165 O. S. 15," and on the face of the complaint it was the opinion of the court, reported at the place cited, which constituted the apparent basis of the charges against the petitioner, that this opinion was eleven pages in length, and that the petitioner was entitled to be advised specifically what portion of the opinion the charges were intended to refer to, and particularly what portion of the opinion was claimed by the Bar Association to state a violation of either the oath of office or some particular Canon of ethics.

It was pointed out to the panel that the failure to specifically advise the petitioner of the charges against him in the manner requested, constituted a failure to comply with the requirements of due process of law. Accordingly, a motion was submitted to the panel that the complaint be ordered to be made more definite and specific, in conformity with the statutory law of Ohio and the requirements of due process of law. This motion was summarily overruled by the panel and the hearing was ordered to proceed forthwith.

From the evidence offered by the Bar Association, it appeared that the misconduct with which the petitioner was charged was the failure of the petitioner to "disclose" or to report to the court, as a part of his account as an administrator, the fee which had been received by him from the sole heir of the estate after the distribution to such heir of the assets of the estate.

This failure on the part of the petitioner was alleged to have constituted a "fraud" upon the court, notwithstanding the fact that no application to the court was made by the petitioner for the payment of any sum whatsoever, and no demand was made on the court for the payment of any additional sum.

In its opinion in the case of *In Re Estate of Wright*, 165 O. S. 15, at p. 23, the Supreme Court of Ohio stated—

> "It is a fundamental principle of law that, where parties having different interests are involved, no lawyer can represent or receive compensation from such parties without a full disclosure, to all the parties involved, of his dual representation and the arrangements as to the compensation to be received therefrom. Every lawyer, worthy of the name, learns this principle ab initio. In fact, it is indicated in the oath of office he takes upon his admission to the bar. It follows that, where one is acting as an administrator of an estate, his sole duty is to its proper administration, and he cannot properly have an arrangement to represent a claimant against the estate without a full disclosure of such arrangement to the court and to all persons concerned in the estate, not only as to the terms of the arrangement but as to the compensation he is to receive therefrom.
>
> "Where one accepts an appointment as administrator of an estate, he represents that he has no arrangement for compensation with anyone concerned with the estate, in the absence of a full disclosure concerning such arrangement and the consent of all interested parties thereto. Certainly, such a representation relates to a material existing fact, and, if he is violating his duty, a lawyer making such representation knows of a falsity. Necessarily, the representation is intended to be relied upon and the court in relying upon it almost inevitably makes orders, such as to fees paid from the estate, which it, in all probability, would not do had a full disclosure been made to it.
>
> "If we must abide, as we do, by the findings of facts by the trial thereof and as sustained by the Court of Appeals, we necessarily must sustain the finding of fraud upon the court by appellee."

The evidence which was presented to the Probate Judge in the *Estate of Wright* upon the proceeding in-

stituted at the request of the Judge himself, and which gave rise to the finding of facts by the Probate Judge by which the Supreme Court of Ohio declared it "must abide," was very different in its most essential aspects from the evidence presented upon the hearing of the complaint instituted by the Cleveland Bar Association.

Since neither the sole heir, who had paid to the petitioner attorney fees for services rendered by him, nor the remaining relatives of the deceased, William A. Wright, nor any other person claimed to have been defrauded in any respect whatsoever by the petitioner, and since the basis of the charge advanced by the Cleveland Bar Association was conduct of the petitioner which had been found by the Supreme Court of Ohio to constitute a fraud upon the Probate Court, in this proceeding the petitioner undertook to offer as a witness on his behalf not only the Probate Judge who was in office at the time the Wright estate was being administered, but his principal deputies who were concerned with the accounting made and filed by the petitioner in the Wright estate.

The Probate Judge testified that any attorney had a right to make an arrangement with an adult client who was the sole heir of an estate for payment of such fee as they might agree upon; that such an arrangement was of no concern to the Probate Court; that he, as Probate Judge, was not interested in being informed of such arrangement; nor was he, as Probate Judge, concerned with its being carried out. The Judge testified that in his opinion there had been no improper concealment of facts from the court in the administration of the Wright estate and no fraud committed upon the court.

The judge's deputies who were in the employ of the court at the time the Wright estate was being administered and who were still in the employ of the court at the time

their testimony was given, testified unequivocally that it was common and accepted practice upon the part of lawyers in Cuyahoga County to make no report or disclosure to the court of fees which had been paid to them directly by clients, whether heirs or other persons interested in the administration of estates.

These witnesses testified that while this practice was not universal, and while some lawyers did make a report and disclosure of fees received in this manner, neither they nor any of the court's employees were interested in or concerned with the payment or the receipt of such fees.

They further testified that there was no rule of court which required counsel to report the receipt of such fees by counsel. And it was taken for granted upon the hearing of the complaint filed by the Cleveland Bar Association in this case that there was no statute or law in effect in the State of Ohio which required such a disclosure.

At no time either during the entire proceedings in the *Estate of Wright*, from its inception in the Probate Court to its culmination in the Supreme Court of Ohio, and at no time during the hearing of the instant complaint filed by the Cleveland Bar Association, was there a statement or opinion voiced by anyone that there was any statute in existence in the State of Ohio requiring such disclosure to be made.

Since it was clear that the petitioner in this case could not be charged with a violation of his oath of office and could not be charged with the violation of a Canon of Ethics, if his failure to disclose the fee paid to him was not in violation of any statute, rule or legal requirement, and since the evidence in this case disclosed beyond question that there was no such rule in existence requiring him to make such disclosure to the Probate Court, the Supreme Court of Ohio, when this matter came before it, was under

the necessity of finding some basis for upholding a charge of misconduct made against the petitioner based upon his failure to disclose.

In its opinion in the case of *Bar Association vs. Pleasant*, 167 O. S. 325, at p. 333, the court said—

> "As to objection No. 2, Pleasant strenuously contends that the panel and the courts have assumed that there was a rule of the Cuyahoga County Probate Court requiring an attorney to report an attorney fee, and that the testimony demonstrates there was no such rule.
>
> "Assuming that such rule did not exist, there is a statute in Ohio, Sec. 2113.36, Revised Code (Sec. 10509-193, General Code), which reads in part as follows:
>
> > '* * * When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration. The court may, at any time during administration, fix the amount of such fees and, on application of the executor or administrator, or the attorney shall fix the amount thereof. * * *.'
>
> "It is obvious that the law of Ohio contemplates that the attorney fees in the administration of an estate shall be allowed and determined by the Probate Court, and if they are to be paid under a contract with an heir of the estate, who is being represented by the administrator as attorney, such arrangement shall be disclosed to the Probate Court, not only because of the statute above referred to, but as a protection against any overreaching."

The interpretation of R. C. Sec. 2113.36, previously known as G. C. Sec. 10509-193, which was made by the Supreme Court of Ohio in this case, had never previously been made or announced by that court or any other court

in Ohio, and no prior decision of that, or of any other court in Ohio was cited by the Supreme Court in its opinion.

Based upon its interpretation of this statute, the court stated in its opinion, 167 O. S. 325, 332:

> "Pleasant, as the administrator, was entitled to represent himself as administrator and was likewise entitled to receive an allowance for legal services, both ordinary and extraordinary, but, nevertheless, such services should be paid for either by allowance by the Probate Court, or after a full disclosure to the court as to any private arrangement he had with an heir of the estate to pay for such services. That he was found to have committed fraud upon the Probate Court was based upon the fact that he failed to disclose to the court or to anyone else, except the person who had signed the contract with him, his arrangement to receive forty per cent of the estate."

Accordingly, the court overruled all objections of the petitioner to the findings and recommendation of the Board of Commissioners on Grievances and Discipline. In these findings and its recommendation, the Board found that the petitioner had been appointed administrator of the Wright estate, that he also acted as attorney for the estate, that at the same time he represented as attorney William Wright, later determined by the court to be the sole heir of the estate, who is referred to by the Board in its findings as a "claimant."

The Board found that the petitioner had failed to make a "disclosure" to the Probate Judge of his representation of William Wright and of the fee received by him from William Wright and concluded:

> "The respondent, as a result of his conduct with reference to said estate, was, as a matter of record, found guilty of perpetrating a fraud upon the Probate

Court of Cuyahoga County, which finding remains unreversed and unmodified.

"Respondent violated the statutory requirements provided for in Sec. 10509-193, Ohio General Code (Sec. 2113.36 Ohio Revised Code), relative to the further allowance of counsel fees to be a charge against an estate.

"The respondent violated the established practice in the Probate Court of Cuyahoga County relative to the procedure pertaining to the allowance of counsel fees to be charged against an estate.

"It is therefore the determination of the Board of Commissioners that the respondent, Henry H. Pleasant, has violated Sec. 30, Rule 27 on disciplinary procedure of the Supreme Court of Ohio. The respondent is guilty of misconduct in that he violated his oath of office and the Canons of Professional Ethics, more particularly, Sections 6, 29, 32 and 38 of said Canons."

An application for rehearing of the Supreme Court's judgment was denied.

ARGUMENT.

Summary.

In this proceeding the Supreme Court of Ohio, for the first time, required the filing, the hearing and the determination of a complaint against a member of the Bar of Ohio to be carried out in accordance with the provisions of a new rule adopted by that court relating to the discipline of lawyers.

In enforcing this procedure, the Supreme Court of Ohio effectively nullified the provisions of Ohio statutes which are still in force, and effectively ousted the jurisdiction of the Common Pleas Court of the county in which the petitioner was engaged in practice as an attorney and before which, in accordance with the universal practice of

Bar Associations throughout the State of Ohio, the complaint against the petitioner would otherwise have been filed.

The rule itself violates basic and elementary requirements of a fair hearing and of due process of law. In a situation in which an attorney may be permanently deprived of his right to continue to practice his profession which he has achieved only at great expense and after many years of effort, he is deprived of the right to appear in person before the Board which is vested with the authority to pass upon and to effectively determine his fate. These and other basic deficiencies in the rule resulting in its invalidity will be discussed.

The power and authority of the Supreme Court of Ohio to adopt the rule is challenged. The right of the court to subject attorneys at law to procedure which is wholly different from and inconsistent with the procedure provided by law in Ohio governing attorneys as well as all other professional persons, is challenged.

The authority of the court to suspend the petitioner's right to practice law in Ohio under the circumstances of this case is challenged when it is grounded upon conduct of the petitioner which was in all respects regular and proper in the view of the judge who is alleged to have been "defrauded," and who was the only one concerned with the petitioner's conduct.

The authority of the court to adopt an interpretation of a statute and to apply it retroactively to the petitioner's conduct is challenged when such interpretation was unknown to the law, to the Bar, or to the courts at the time the petitioner's conduct took place.

The fact is noted that there is no claim of overreaching or overcharging by the petitioner in this case. The fact is noted that the fee paid directly to the petitioner after dis-

tribution of the assets of the estate is not claimed to be unreasonable. The fact is noted that no intent to defraud anyone is charged against the petitioner and that no actual resultant fraud upon any person is charged against the petitioner.

The fact is noted that the procedure applied to the petitioner in this case will hereafter be applied to all complaints made or prosecuted against all members of the Bar of the State of Ohio in any situation, and that the members of the Bar of the State of Ohio in each such instance will be subjected to all of the deficiencies of the court rule and to its lack of fairness, and to the failure of the rule to comply with the requirements of due process of law with which the petitioner in this case has been faced; and that there is no authority other than this Court to whom an appeal can be made for remedy or redress of such grievances.

The Separation of Powers in Ohio.

The framework of the government of Ohio follows the basic separation of powers adopted in the Constitution of the United States as the republican form of government guaranteed to all citizens of the United States in their respective state governments.

As in the constitution of the United States, the residual powers of government have been retained by the people of Ohio, through their constitution, which provides, Article I. Sec. 20:

> "This enumeration of rights shall not be construed to impair or to deny others retained by the people; and all powers, not herein delegated, remain with the people."

As between the legislative and the judicial branches of the government of Ohio, the people of Ohio have designated the legislative branch of the government as superior.

Provisions of the constitution of Ohio, enactments of the state legislature and the traditional history of the separation of powers in the state, have vested the General Assembly of Ohio, the legislative body of the state, with supervision and control over the exercise by the judicial branch of almost every power required by the judiciary for the operation of its functions and the administration of justice by the courts of the state.

This supervisory control over the judicial branch of the government by the legislature has, throughout the history of the state of Ohio, become an integral part of the republican form of government in Ohio. And it is a republican form of government within this framework, as set up by the people of the state and administered for more than 150 years, that is guaranteed to the people of the state of Ohio and for the benefit of the people, by the provisions of Article IV, Sec. 4 of the Constitution of the United States.

It is the separation of powers between the legislative and judicial branches of the state of Ohio within this framework which the Supreme Court of Ohio has undertaken to rupture by an act which is contended to be utterly beyond the power and the authority of the Supreme Court of Ohio, and in violation of the constitutional rights of the people of this state. Article II, Sec. 1, of the Constitution of Ohio vests the entire legislative power of the state in the General Assembly:

> "The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives * * *."

There is no limitation whatsoever upon this "legislative power" other than those incorporated in the constitution of the state and dealing with specific subjects of legislation.

Except for these specific limitations, it is within the constitutional competence and authority of the legislature to enact laws dealing with any subject whatsoever which may be regarded by the General Assembly as in the interest of the people of the state and which do not contravene a specific provision of the constitution of the state.

The first constitution of Ohio was adopted in 1802, one year prior to the admission of the state as a member of the Union. That constitution conferred upon the General Assembly the same broad legislative power as did the second and existing Constitution adopted in 1851.

For over 100 years every phase of practice and of procedure in the courts of Ohio has been regulated by the legislature. From the kind and the form of pleadings to be filed in a trial court, through the nature and the method of reception of evidence, the supervision of the judge over the trial of the cause, the manner and the method of the entry of judgments, the nature of, the limitations upon, and the effect of appeals—at every step, it is the hand of the legislature which guides and directs and governs and imposes the will of the people upon the judges in the minutest exercise of their judicial functions.

There is not now, and there has not been in the entire constitutional history of the state, any departure from the exercise of this control by the legislative branch of the government over the judicial. Consonant with the authority vested in it, the General Assembly of Ohio undertook from the earliest times to prescribe not only the grounds upon which members of the bar of the state could be disciplined or suspended, or removed from the roll of attorneys, but the General Assembly provided the procedure by means of which such action could be instituted, determined and concluded.

In 1824 the General Assembly enacted a statute which is the forerunner of the present statutes of Ohio on this subject, and the procedure provided by the enactment of 1824 is substantially that to be found in the present laws. From time to time the legislature adopted amendments to the original statutes dealing principally with the grounds on the basis of which complaints against lawyers could be instituted. In general, through a series of such amendments, grounds for disbarment and suspension of lawyers have become more restricted by statute in Ohio; but the procedure provided by the legislature has remained substantially unaltered. And it is one of the distinctive and vital steps in a procedure provided by statute that jurisdiction to receive and to determine complaints against members of the bar is conferred by statute upon not only the Supreme Court of the state, but upon the Courts of Common Pleas as well. Article IV, Sec. 4, of the present (1851) Constitution of Ohio, provides that:

> "The jurisdiction of the courts of common pleas and of the judges thereof shall be fixed by law."

Pursuant to that provision of the constitution, the General Assembly continued in effect the statute which had been in existence since 1824. Now known as Sec. 4705.02, Revised Code, formerly Sec. 1707, General Code, it provides:

> "The Supreme Court, Court of Appeals, or Court of Common Pleas, may suspend or remove an attorney at law from office, or may give private or public reprimand to him, as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude. Such suspension or removal shall operate as a suspension or removal in all courts of the state."

In sections of the Code immediately following, the legislature has provided the procedure for the filing of complaints against attorneys in the Court of Common Pleas and other courts, and for the method of hearing and determining such complaints.

There is no provision in the Ohio constitution concerning attorneys and there is no inhibition in the constitution of Ohio barring or limiting the authority of the legislature to deal with the subject of attorneys, just as there is no provision to be found in the constitution of Ohio barring or limiting the power of the legislature to control, in the minutest degree, practice and procedure in the courts of the state. Accordingly, there is a long standing set of valid statutes completely covering the subject matter of attorneys and the practice of law, dealing with admission to practice, discipline, removal, review, liability in certain cases, the practice of law and the punishment by fine for unauthorized practice of law.

Prior Ohio Court Decisions on Attorneys and the Practice of Law.

In many decisions prior to the instant case, the Supreme Court of Ohio has recognized and applied the procedural provisions of the Ohio statutes relating to complaints against members of the bar. In those decisions, the Supreme Court has referred to the procedural provisions of the statutes as mandatory and has recognized that they are binding upon the court.

In 1923, in the case of *In Re Hawke*, 107 O. S. 341, 140 N. E. 583, the court stated categorically in its opinion:

> "It is urged, however, that the *courts* have an inherent right to disbar or suspend attorneys at law from the practice of their profession, and that, therefore, they are in a measure an exception to the general rule as to other licensed persons. We do not

understand that *when the legislature confers a right upon a citizen of Ohio* any court has an inherent right to arbitrarily, or *for any cause other than that enumerated in a statute* deprive such person of such right, *even though he be an attorney at law who is a quasi member of the court.*

"Courts always have had and must have the power to hear and determine contempts of court and to fine persons, even attorneys at law, guilty of such contempt, and they may impose penalties that are at least the equivalent of temporary suspension from the practice; **but they may not, as an inherent right, disbar an attorney at law, when that right has been conferred by a statute.**

"Attorneys at law are and should be governed by the same constitutional provisions touching the jurisdiction of courts as are other persons and professions."

The next pronouncement by the Supreme Court of Ohio on this subject appears in the opinion of the court in the case of *State ex rel. Levy vs. Savord, Judge*, decided in 1944, 143 O. S. 451, 55 N. E. 2d 735:

"*Under the provisions of Sec. 1707, General Code, express jurisdiction is conferred on the Court of Common Pleas* to suspend or remove an attorney at law from office, or to take other disciplinary measures of less severity, for specified causes."

In 1949, the Supreme Court stated in its opinion in the case of *State ex rel. Joseph vs. Crossland, Judge*, 152 O. S. 199, 88 N. E. 2d 289, with reference to the procedural provisions of the disciplinary statutes:

"The above quoted provisions of Section 1708, General Code are mandatory."

and further in the same opinion:

"*The requirements of disbarment statutes are to be strictly construed in favor of one against whom charges are filed.*"

As recently as 1955, the Supreme Court declared in the syllabus of the case of *In Re Lieberman*, 163 O. S. 35, 125 N. E. 3d 328:

> Syl. 1—"*A proceeding to suspend or remove an attorney at law from office is strictly statutory.*"

The choice of the language "strictly statutory" with reference to proceedings in disciplinary actions against lawyers, unquestionably reflected the established law in the State of Ohio for a period of what then amounted to 131 years.

Question of the Inherent Powers of a Court with Respect to Attorneys.

It was not until the policy of the people of the State of Ohio, with respect to the admission of attorneys to the practice of law, grounds upon which proceedings for suspension or disbarment could be maintained and the method of procedure to be followed in such cases, had been established by the people through legislative action and maintained continuously for a period of 85 years, that the Supreme Court of Ohio first alluded to what it termed its "inherent" powers in this field in 1909. In the case of *In Re Thatcher*, 80 O. S. 482, 89 N. E. 39, the court held:

> "Syl. 1—The Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, resulting as an incident of its organization as a court, as well as from its power to admit to the bar.
>
> Syl. 2—The provisions of Sec. 563 Revised Statute are not an attempted enlargement of the jurisdiction of the several courts therein named, in contravention of the constitution, but are regulatory provisions recognizing already existing powers of the courts."

During this entire period of 85 years, and until the pronouncement of the Supreme Court of Ohio in the

Thatcher case, there had never been a single hint or a supposition that the people of the state of Ohio were without power to adopt and to fix the policy of the law in Ohio through the legislative branch of their government with respect to the admission to practice, the suspension and disbarment of attorneys. Until the pronouncement in the *Thatcher* case there had never been a hint or supposition that the statutes which had been in effect for almost a century, were simply "regulative provisions recognizing already existing powers of the courts."

It had always been considered that the statutes defined and proclaimed the law of the state of Ohio on this subject. However, in 1909 the Supreme Court of Ohio was not yet ready, apparently, completely to disregard or *to nullify the* provisions of the statutes, nor was it yet ready to assume that it, the Supreme Court of Ohio, had the right to assume sole and exclusive jurisdiction in this field and to oust the jurisdiction with which the statutes of the state endowed other courts. The Supreme Court then merely declared in its opinion:

> "Numerous authorities, English, federal and state assert such jurisdiction as inherent in every court of record as a necessary incident of its organization as a court, and that it specially, although not exclusively, results from the power to admit to the bar, and that such original jurisdiction exists even in courts of appellate jurisdiction."

Thus, the Supreme Court in the *Thatcher* case recognized that such inherent power as it might have belonged not alone to the Supreme Court, but was—

> "inherent in every court of record as a necessary incident of its organization as a court."

The court further pointed out that this "inherent power" "exists even in courts of appellate jurisdiction."

In line with this pronouncement of the Supreme Court in 1909, the Court of Appeals of Cuyahoga County, embracing the territory of the City of Cleveland, declared in a disbarment proceeding brought in 1917, *In the Matter of Edward P. Strong*, 27 O. C. C. n.s. 257, 29 O. C. D. 81, that—

> "We conclude, on this point, that we have jurisdiction of the subject brought before us in the proceeding, inherent in our court and not needing the aid of any written or formal law to call it forth and set it in motion towards such mode or measure of redress or remedy as may commend itself to a fit discretion in our exercise of the power so existing."

It should be pointed out that long after the statutes relating to the disbarment of attorneys had been enacted by the legislature, an amendment to the constitution of Ohio was adopted in 1912. That amendment fixed and defined the limits of all jurisdiction of the Courts of Appeals of Ohio, both original and appellate, and the Court of Appeals in the *Strong* case accordingly concluded that the statutes which had so long been in effect could no longer confer on that court original jurisdiction in a disbarment proceeding, which had not been conferred under the provisions of the constitution.

It is perhaps further significant to note that this situation was brought to light by the court itself; that both the prosecuting committee of attorneys and counsel for the respondent attorney were of the opinion that the provisions of the statutes were still effective:

> "The proceeding is prosecuted under the supposed authority of Sec. 1707 of the General Code, which purports to confer on this court jurisdiction to forbid the accused to practice law in all of the courts of the state, if found guilty of either misconduct in his office

of an attorney, or unprofessional conduct involving moral turpitude.

* * *

"Before proceeding to the consequent step of meting out the adequate penalty to be annexed to the respondent's breach of duty as an officer of the courts of Ohio—including this court—we have thought it fit to examine, with some care, the basis of our power to act in the matter at all, and the source and extent of the jurisdiction of this court in this proceeding. The question was not raised in argument, but it is in the case—to a considerable degree decisively—and we must deal with it accordingly.

"Before the adoption of the amended Constitution of 1912, the General Assembly of Ohio had large discretionary powers to confer jurisdiction upon the courts of the state, including the predecessor of this court. But since that constitution became effective, the former legislative source of jurisdiction as to this court is cut off and wholly denied. To find what the jurisdiction of this court is, in any case one must go behind the statutes and look to the Constitution itself. * * *

"The statute, therefore, which is relied on to direct us to give judgment in this case, is altogether inert and without power to do so. * * * In this very proceeding a possible want of power on our part to determine the matter seems not to have occurred to the able counsel on either side; for no such infirmity is suggested."

Accordingly, the Court of Appeals in the *Strong* case was obliged to find that it had no jurisdiction to consider the original disbarment complaint brought before it in that case, unless it had, as it determined, that inherent power to consider and to determine the complaint which the Supreme Court of Ohio in the *Thatcher* case declared to

exist "in every court of record as a necessary incident of its organization as a court."

The next pronouncement of any Ohio court concerning the inherent powers of the courts in this field, is found in the opinion of the Supreme Court of Ohio in the case of *In Re Hawke*, referred to above, page 31, 107 O. S. 341, 140 N. E. 583. In that case the Supreme Court expressly recognized the fact that the right to practice law in Ohio was a right which had been conferred, not by the court, but through the legislature of the State of Ohio by statute. In its opinion, also referred to above, pages 31-32, the court declared:

> "We do not understand that when the legislature confers a right upon a citizen of Ohio any court has an inherent right to arbitrarily, or for any cause other than that enumerated in a statute, deprive such person of such right even though he be an attorney at law who is a quasi member of the court."

And in the same opinion the court added, after discussing the inherent power of the court in the field of contempt, that—

> "Courts * * * may not, as an inherent right, disbar an attorney at law when that right has been conferred by a statute."

referring to the right of the attorney to practice law in the State of Ohio; and the court concluded in the *Hawke* case that:

> "Attorneys at law are and should be governed by the same constitutional provisions touching the jurisdiction of courts as are other persons and professions."

It is submitted that these pronouncements by the Supreme Court of Ohio in the *Hawke* case constitute a declaration of the principles of law in this field which had

been in effect in Ohio for a period of precisely 100 years at the time the *Hawke* case was decided.

These pronouncements continued as the law of Ohio for 33 years more, until in 1956 the Supreme Court of Ohio decided the case of *In Re McBride*, 164 O. S. 419, 132 N. E. 2d 113. In that case, for the first time in a period of 132 years, the Supreme Court of Ohio found that it was not obliged to follow the provisions of the Ohio statutes expressly defining the grounds upon which an attorney could be suspended or disbarred, and that the policy of the people of the state of Ohio, as fixed by the legislative branch of the government, could be disregarded under the guise of a newly discovered "inherent power."

In the *McBride* case, the court declared:

Syl. 1—"The power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission, rests inherently in the judicial branch of the government."

Syl. 2—"The legislative branch may provide by statute standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend or otherwise discipline attorneys for specified causes, but such legislation is to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects."

Syl. 3—"Statutes authorizing the disbarment, suspension or discipline of attorneys on stated grounds do not operate as a restriction on the general power of courts over attorneys, who are their officers, to disbar, suspend or otherwise discipline them on grounds other than those specified by statute."

Syl. 4—"The inherent powers of courts to disbar, suspend or otherwise discipline attorneys are not affected by recognizing and following the regulations and practice prescribed by statute on the subject."

Accordingly, in the *McBride* case the Supreme Court of Ohio undertook completely to disregard a provision of the statutes which had been incorporated therein by amendment many years earlier limiting the power of the courts to suspend or disbar attorneys to cases of misconduct on their part involving moral turpitude.

A petition for a writ of certiorari from this Court was filed in the *McBride* case but denied, 351 U. S. 965, 76 Supreme Court 1030.

Whatever was said by the Supreme Court of Ohio in the *McBride* case concerning the method and procedure provided by statute in disbarment matters was purely dicta, but the court at least recognized again the regulatory powers of the legislative branch of the government over the exercise of its own powers by the judicial branch of the government.

In its opinion in the *McBride* case, the court stated:

"True, in the case of In Re Lieberman, 163 O. S. 35, 38, 125 N. E. (2d) 328, 330, it is said that

> 'A proceeding to suspend or remove an attorney at law from office is strictly statutory.'

but we see nothing inconsistent or incongruous in following the mechanics and mode of procedure provided by statute for the initiation and conduct of proceedings for the reprimand, suspension or removal of attorneys and at the same time enlarging the statutory grounds for such action by the exercise of the inherent powers possessed by courts in these matters."

Even in the *McBride* case therefore the Supreme Court of Ohio recognized that the *procedure* which was required to be employed in disbarment matters was still "strictly statutory," as the court had declared in the *Lieberman* case decided only the previous year. But this recog-

nition of the authority of the legislature to establish procedure, which had previously been declared both mandatory and strictly statutory in disbarment matters, was not long lived so far as the present members of the Supreme Court were concerned.

In the very same year, 1956, in which the *McBride* case was decided, the court promulgated its amended Rule 27 set forth at p. 1a in the Appendix hereto, creating a Board of Commissioners on Grievances and Discipline and declaring that this board was vested with exclusive jurisdiction to hear and to determine all complaints wherever arising against any member of the bar of the State of Ohio.

By so doing, the Supreme Court, of course, nullified, or, at least, has attempted to nullify, the statutory jurisdiction of all courts of common pleas of Ohio; the court has nullified, or has attempted to nullify, the procedural provisions of the statutes relating to all complaints against members of the bar, in whatever court such complaints might be instituted pursuant to said statutes. And, when objection was voiced in the instant case to this assumption of authority upon the part of the court, which is believed to be arbitrary, unconstitutional and without any foundation in law to support it, the Supreme Court of Ohio curtly stated in its opinion in this case:

> "Obviously, the whole matter with reference to the power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission, has been settled in the case of In Re McBride, supra. * * *
>
> "There can be no question now of the inherent power of this court as to the disciplining of attorneys and, therefore, of its power to provide by rule the procedure in reference to hearings upon such question. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline."

No effort was made by court in this case to overrule its prior decisions declaring the procedure provided by the legislature to be mandatory, and declaring that the procedure be followed in disbarment matters was strictly statutory. No reference was made by the court to its pronouncement in the *McBride* case recognizing the regulative authority of the legislature over the exercise of the powers of the judiciary. And in answer to the unanswerable statement that Rule 27 of the Supreme Court has completely ousted the courts of common pleas of the state from jurisdiction conferred upon them by statute, the court stated:

> "The contention that the Supreme Court cannot deny the inherent power of courts of common pleas with reference to disciplinary actions against attorneys would be a matter of concern if that question were before us. However, since the present case is one in which only the inherent power of the Supreme Court to discipline an attorney is concerned, and since Rule 27 only concerns itself, so far as the matter is now before us, with the procedure for exercising disciplinary action before this court, we are impelled to hold that there is nothing unconstitutional about the rule so far as it applies to the present case."

Consider, please, the manner in which the Supreme Court of Ohio has attempted to avoid, in its decision in this case, a vital question of arbitrary and unconstitutional assumption by it of the power to nullify completely the provisions of legislation which has been in effect in Ohio for 134 years. In effect, the court has stated to the petitioner in this case:

> "We recognize the existence of the statute which confers jurisdiction upon the Court of Common Pleas of Cuyahoga County to hear and to determine the complaint made against you by the Cleveland Bar Association.

"We recognize that no complaint filed against any lawyer in Cuyahoga County by either bar association in that county has ever heretofore been filed directly with this court, and that with a single exception all such complaints have been filed before the Common Pleas Court of Cuyahoga County pursuant to the provisions of the existing statute.

"We recognize the fact that by the rule which we have adopted, we have ordered the Cleveland Bar Association, as well as all other bar associations within this state, to file all complaints against lawyers with the Board of Commissioners which we have appointed.

"We recognize that the Cleveland Bar Association has filed a complaint against you in this case before the Board of Commissioners, in accordance with the order which this court has issued.

"We recognize that but for such order, the Cleveland Bar Association would undoubtedly, have filed its complaint with the Court of Common Pleas of Cuyahoga County in accordance with the prior universal practice.

"We recognize the fact that all bar associations in the state are expected to obey the rule which this court has issued and to file all complaints with the Board appointed by this court.

"We recognize the fact that all courts of common pleas of this state are expected to obey the rule which this court has issued and to decline to hear and to determine any complaints against members of the bar of this state.

"We recognize that in effect the procedural provisions of the statutes of Ohio have been nullified by our rule.

"Nevertheless, you are not aggrieved by the order which we have issued to the Cleveland Bar Association to file its complaint with the Board which we

have appointed. You are not aggrieved by the failure of the Cleveland Bar Association to follow the statutory provisions relating to procedure, which would have been followed by that association except for the rule which we have adopted. You are not aggrieved by the failure of the Cleveland Bar Association to file its complaint against you with the Court of Common Pleas of Cuyahoga County, which would have been done except for the rule which we have adopted.

"You are not aggrieved by your inability under the provisions of our rule to appear, both personally and by counsel, in the presence of the Court of Common Pleas of Cuyahoga County, which you would have had a right to do under the provisions of the statutes of Ohio, except for the mandatory provisions of the rule which we have adopted.

"Accordingly, you may not raise in this case any question concerning the nullification by our rule of the procedural provisions of the Ohio statutes, and that matter is not now before us in this case."

If it is possible to do so without intending to be disrespectful to the Supreme Court of Ohio, or intemperate in our characterization of the conduct of that court, we should like to say that the action of that court in refusing to pass upon the federal constitutional question directly involved in this case, appears to us to be arbitrary and indefensible.

The Supreme Court of Ohio, through the rule which it adopted, has utterly destroyed the procedural rights accorded to the petitioner under the provisions of the Ohio statutes, as effectively as it could do if it had the power to repeal the statutes and had exercised that power. By its statement that the question which is here raised is not before it in this case the Supreme Court of Ohio is attempting to place itself in an invulnerable position with respect to the question here raised, since the court well

knows that no bar association in the State of Ohio will undertake to disobey the rule of the court, and no Court of Common Pleas of the State of Ohio will undertake to disobey the rule of the court. Therefore, in the view of the Supreme Court of Ohio the question of unconstitutional nullification of the Ohio statutes can never be raised in any case.

Limitation Upon the Inherent Powers of the Court.

The instant case is not the first case to come before the Supreme Court of Ohio involving the [illegible] of the legislative branch of the government of Ohio to regulate the exercise of judicial power, whether the source of that judicial power be constitutional, statutory or inherent.

The decisions of this Court, as well as the decisions of the Supreme Court of Ohio rendered under a great variety of circumstances and in many aspects, recognize that one of the indispensable inherent powers of every court is the power to find a party, witness or person coming before the court in any capacity, guilty of contempt and to impose punishment accordingly.

In the state of Ohio the legislature has undertaken to *regulate* the exercise by the court of the inherent power of contempt and this regulation by the legislature has been in effect for over 100 years.

In the present Ohio Code of Statutes, the Ohio Revised Code, there will be found an entire chapter, Chapter 2705, containing ten sections specifying the procedure which must be followed by the courts of the state in contempt matters and the rights which are accorded by statute to persons charged with contempt of court.

In the case of *Ex Parte Morris*, 77 O. S. 598, 48 N. E. 1129, the Supreme Court of Ohio affirmed without opinion

the decision rendered in that case by an Ohio Circuit Court, reported in 8 O. C. C. N. S., 212, 18 O. C. D. 611. By such affirmance the Supreme Court of Ohio adopted as the correct rule the statement of the Circuit Court that it is the *duty* of the courts—

> "To conform to a statute which does not abridge (inherent) power but simply points out the manner in which it shall be exercised."

The second paragraph of the syilabus in that case states:

> **"While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power but simply points out the manner in which it shall be exercised."**

Surely there is no difference or distinction between whatever inherent powers a court may possess. Surely, if, as the Supreme Court of Ohio has stated, it has an inherent power to discipline members of the bar, that inherent power is of no greater degree or different quality than the inherent power of the same court in contempt proceedings. Surely, if, as the Supreme Court of Ohio has declared in the *Morris* case, 77 O. S. 598, 84 N. E. 1129, it is the duty of the court to conform to a statute which "simply points out the manner in which it (its inherent power) shall be exercised," this duty applies equally to the statutes of the State of Ohio, which have been so long in effect, relating to disciplinary complaints against members of the bar.

These considerations were called to the attention of the Supreme Court of Ohio in the present case, and its decision in the *Morris* case was cited but no comment was made by the court with respect to either the effect or the logic of its prior decision.

An annotation appearing in Vol. 121 *A. L. R.*, pp. 215 to 294, collects the cases dealing with the power of a legislature to *regulate* the power of the courts with respect to contempt proceedings. At page 235 of that volume, the annotator states:

> "Even while the power of the legislature to abridge or limit the inherent judicial power of courts to punish for contempt is denied, it is recognized and held in most jurisdictions that the legislature may make reasonable regulations governing the exercise of the power to punish for contempt."

It is a matter of great moment, not only to the people of the State of Ohio, but to the citizens of all states, that this Court define the limits beyond which no state court may go in nullifying or repealing by implication the procedural safeguards which have been enacted into law and which represent the policy of the people of the state.

It is a matter of great moment that the Supreme Court of the State of Ohio, as well as all other state courts, be admonished by this Court, that the exercise by such courts of their authority to discipline members of the bar may be regulated by statute and that procedural safeguards which have been enacted into law by the legislature for the benefit of members of the bar must be respected and obeyed by the courts, and may not be nullified or callously set aside.

This is a subject upon which this Court has not heretofore issued any pronouncement, although in the leading case of *Ex Parte Garland*, 71 U. S. 333, at p. 379, this Court pointed out in its opinion, with respect to the right to practice law before the courts of the United States:

> "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescrit

qualifications for the pursuit of any of the ordinary applications of life."

The basis for such authority residing in the legislature was well stated by the Supreme Court of North Carolina in the decision rendered by it as long ago as 1906, entitled *In Re Applicants for License*, 143 N. C. 1:

> Syl. 2—"Revisal, Chapter 5, establishing the qualifications for applicants to practice law, is not unconstitutional as an unwarranted exercise of judicial power prohibited by Section 8 of the Declaration of Rights, nor as an unlawful attempt to deprive the court of its inherent power to direct and control the conduct of attorneys who are its officers."
>
> Syl. 3—"The legislature has the right to establish the qualifications to be required of one to become a practicing member of the bar by virtue of the police power which is vested in that body."

The Question Relating to the Grounding of the Complaint Against Petitioner Upon an Invalid Judgment of the Supreme Court of Ohio.

The complaint filed against the petitioner in this case contained only the single sentence:

> "Now comes the Cleveland Bar Association, the relator herein, and says that Henry H. Pleasant, the respondent, has been guilty of misconduct within the meaning of Rule 27, paragraph 5 of the Supreme Court of Ohio, as more specifically set forth in the case of In Re Estate of Wright, 165 O. S. 15."

If the judgment of the Supreme Court of Ohio in that case was beyond the jurisdiction of that court to render, and if the case was not properly before that court, then the entire basis of the complaint against the petitioner in this case must fall. In that event, there was nothing upon the basis of which the Supreme Court of Ohio could act,

and no finding could be made by that court, and no disciplinary order issued against the petitioner herein.

The case of *In Re Estate of Wright* was brought to the Supreme Court of Ohio by three lawyers acting solely in the capacity of amici curiae. At the very outset of its opinion in the case of *In Re Estate of Wright*, the Supreme Court of Ohio stated:

> "The cause is before this Court by reason of the allowance of a motion to certify the record, which motion was filed by Jack A. Persky, Victor DeMarco and John R. Kistner, amici curiae, by appointment by Walter T. Kinder, Judge of the Probate Court of Cuyahoga County."

It is not only contrary to the provisions of the statutes of Ohio, and contrary to the principles enunciated in all Ohio reported authorities, and contrary to the decisions in every reported authority in any jurisdiction in this country, state or federal, but it is a violation of the basic principles of due process of law that an appellate court shall accept an appeal brought to it by amici curiae and shall thereupon cause a decision to be rendered against the appellee who is the petitioner in this case, when no judgment, order or relief can be granted to, or in favor of, the amici curiae who are responsible for bringing the appeal.

It is further contended that it is a violation of the petitioner's constitutional rights and a deprivation of due process of law that the Supreme Court of Ohio should proceed to hear and to determine the complaint filed against him by the Cleveland Bar Association which was based upon the prior judgment of the Supreme Court of Ohio in the matter of the *Estate of Wright*, when, at the same time that such complaint was heard and determined there was pending before the Supreme Court of Ohio a

petition to vacate the judgment which that court had previously rendered in the *Wright* case.

It is suggested that the Supreme Court of Ohio owes a duty, not only to the petitioner, but to the entire bench and the bar of the State of Ohio to proceed to administer justice in an orderly manner.

It is suggested that the action of the Supreme Court of Ohio in hearing and determining the complaint of the Cleveland Bar Association, based upon a prior judgment of the same court, when that court had before it a pending petition to vacate its prior judgment, constitutes not only a deliberate refusal on the part of that court to administer justice in an orderly and even-handed manner, but constitutes a denial to the petitioner of due process of law.

It is suggested that the action of the Supreme Court of Ohio in declaring that a motion, filed with it to vacate the judgment in the *Wright* case, would be considered simply as a second application for a rehearing and, accordingly, summarily overruled, was a denial to the petitioner of due process of law.

It is suggested that the action of the Supreme Court of Ohio in directing the clerk of that court to return to the printer the first petition for vacation of the judgment in the *Wright* case, which petitioner sought to file with that court, is an indication of an entire lack of that orderly and even-handed administration of justice which due process of law requires.

No court of appellate jurisdiction in any state in this country, or elsewhere, and no court of appellate jurisdiction among the courts of the United States, has ever permitted the filing of an appeal by amici curiae, and the action in this regard in the *Estate of Wright* by the Supreme Court of Ohio, is utterly unique and without precedent.

The fact that this situation was not called to the attention of the Supreme Court of Ohio, and that the question was not raised before that court until for the first time in the filing by the appellant of a motion to vacate the judgment rendered in that case, could not have the effect of vesting that court with jurisdiction which it did not otherwise have.

There is no dispute about the law in Ohio on this subject. It has been clearly laid down by the Supreme Court of Ohio. On the general subject of who may appeal, the rule is stated in Vol. 2 *Ohio Jurisprudence*, 2d. Series, at page 757:

> "The laws regulating appeals in Ohio are such that only parties to the litigation may appeal from judgments or final orders of inferior tribunals."

In *The City of Middletown vs. City Commissioner of Middletown*, 138 O. S. 596, 603, 37 N. E. 2d. 609, 613. Judge Zimmerman writing the opinion of the court, stated:

> "The right of appeal is not an inherent or inalienable right but must be conferred by authority upon the person who would enjoy it. * * *. * * * and the apparent legislative intent was to confer the right of appeal on such persons as are parties to an action. * * *
>
> "Third persons are not authorized to act by the law; nor would good policy allow them to interfere and remove causes by appeal. It is manifest that such a practice could not be tolerated as it would produce many evils. Reid vs. Quigley, 16 Ohio 445, 447."

Kennard vs. Kennard, 35 O. S. 660:

> "To constitute a proceeding in error, there must be a plaintiff in error. *If there is no plaintiff in error, the court acquires no jurisdiction of the cause.*"

Ohio Contract Carriers Association vs. Public Utilities Commission, 140 O. S. 160, 42 N. E. 2d. 758:

Syl.: "*Appeal lies only on behalf of a party aggrieved* by the final order appealed from. *Appeals are not allowed* for the purpose of settling abstract questions but *only to correct errors injuriously affecting the appellant.*"

The only decision in Ohio specifically applying these principles to amici curiae, is the case of *Board of Commissioners of Montgomery County vs. Cooper's Unknown Heirs*, 50 Ohio Law Abs. 20, 75 N. E. 2d. 84, Appeal Dismissed 152 O. S. 202, 88 N. E. 2d. 293:

Syl. 2: "An amicus curiae has no right to become a party to an action, to except to rulings of court, or prosecute an appeal."

In its opinion, the court stated:

"By no principles of legal reasoning can a friend of the court become a party to the action."

That this is the accepted law in Ohio is evidenced by the following statement appearing in 2 *Ohio Jurisprudence* 2d 388:

"An amicus curiae does not become a party to the action in which he appears, and has no right to take upon himself the management of the cause. * * * Neither has he the right to except to the rulings of the court or to prosecute an appeal."

In the entire field of jurisprudence, including both adjective and substantive law, it is almost impossible to find any rule without an exception. It is submitted, however, that *this* rule, absolutely barring an amicus curiae from attempting to act as a party to a case and from prosecuting an appeal, is one rule without any exception. The cases stating the rule are so numerous that a single reference to the text of *Corpus Juris* should suffice, 3 C. J. S. 1051:

"Since, as stated in the title Appeal and Error, Sections 466, 491, no person can prosecute an appeal or writ of error unless he is a party or privy, or in some way aggrieved by the judgment, an amicus curiae has no right to prosecute an appeal or writ of error, or to maintain a bill of review, and the court cannot appoint an amicus curiae to represent it on appeal."

If it be asked by the members of this Court why the Supreme Court of Ohio undertook to allow an appeal prosecuted by amici curiae against the petitioner in this case, and then undertook to render a judgment against this petitioner, which that court must have anticipated would become the basis for the complaint subsequently filed against him by the Cleveland Bar Association in this proceeding—it is respectfully suggested that this action of the Supreme Court of Ohio was in the same category as the action of the court in summarily overruling a motion to vacate its judgment, and in the same category as the action of the court in deliberately directing the clerk of the court to refuse to accept and to file a petition to vacate its judgment which the petitioner sought to file, and in the same category as the action of the court in requiring three counsel representing the petitioner to make a 300-mile round-trip to the state capitol in order to assure that petitioner's petition to vacate the judgment in the *Wright* case would be accepted and filed by the Clerk of the Supreme Court of Ohio.

And, it is respectfully submitted that the action of that court is in the same category as the further action of the court in passing upon the complaint of the Cleveland Bar Association in this proceeding when the petition to vacate its judgment in the *Wright* case was still pending and constituted the basis for the complaint of the bar association.

The Question Relating to the Invalidity of Rule 27 of the Supreme Court of Ohio.

This brief has already exceeded appropriate bounds in demonstrating the great importance and general interest of the constitutional questions involved. Petitioner cannot, however, fail to direct to the attention of the Court, as among issues of paramount importance in this case, the many provisions of Rule 27 of the Supreme Court of Ohio which contravene the requirements of due process of law.

We deem that it will suffice, at this time if a simple statement of the deficiencies of this rule is set forth and that no attempt be made here to argue such deficiencies, or to present the authorities upon the basis of which they may be demonstrated.

At the outset, it is contended that the entire procedure contemplated by Rule 27 of the Supreme Court of Ohio, involves an unconstitutional delegation of judicial power by the court. The rule itself is replete with authority vested in the Board of Commissioners on Grievances and Discipline, the exercise and application of which, by the members of that board, necessarily involves judicial power.

Since the procedure which the Supreme Court of Ohio has now set up is embodied in great detail in Rule 27, and the rights of the petitioner as a member of the bar under the provisions of this rule are only such rights as the rule itself allows him, he has been deprived of the privileges and the safeguards erected by statute for his benefit, and this also is a deprivation of his rights without due process of law.

There is no provision in the rule that the hearings conducted by the panel selected by the chairman of the Board of Commissioners shall be conducted in accordance with the rules of evidence, or that the hearings shall be conducted in a manner consonant with the requirements of a

fair hearing as contemplated within the meaning of due process of law.

There is no provision in the rule by means of which the petitioner could present and argue questions of law which might arise and which, in the ordinary course of events, should be determined before any hearing is commenced.

There is no provision in the rule for the presentation of a demurrer to a complaint filed against the petitioner or any member of the bar, and there is no provision in the rule for a ruling by the panel, or by the Board of Commissioners, upon a demurrer or any other question of law.

In fact, the record in the instant case discloses the existence of a grave doubt in the minds of the commissioners themselves concerning their right to take any action on legal questions raised prior to, or in the course of, the hearing. In the instant case this resulted in an injustice to the petitioner of so serious a nature as to deprive him of one of the essential prerequisites of due process of law. The complaint against him, as noted above, was couched in the most vague and general terms. Reference was made in the complaint only to the decision of the Supreme Court in 165 O. S. 15, a decision 12 pages in length.

There was no reference to any specific portion of this decision, or to any specific finding made by the court. There was no charge that the petitioner had violated any one, or more than one, of the Canons of Ethics.

When, notwithstanding the petitioner's understandable refusal to subject himself voluntarily to the jurisdiction of the Board, the petitioner sought to have the complaint made more specific, his attempt in this regard was summarily denied by the members of the panel. This, notwithstanding the fact that the provisions of Section 4705.-03, Revised Code, require the filing of written charges "stating distinctly the grounds of complaint."

There is, as noted above, no provision in the rule that the petitioner, or his counsel, may appear as a matter of right, at any time, in the presence of any court or judge. The fact that in the instant case the Supreme Court of Ohio saw fit to extend to the petitioner, as a matter of grace, the right to appear by counsel and to argue on a motion to show cause directed to the petitioner by the court, does not cure the infirmity of the rule itself. In failing to accord this privilege to the petitioner, as a matter of right, the rule is, in this respect, a denial of due process of law.

Finally, there is the matter of the invalid assessment of costs against the petitioner in the amount of approximately $800.00. All court costs in Ohio are governed and fixed by statute. Court costs in the average case in the Common Pleas Court of Cuyahoga County where the petitioner resides and practiced law, amount to no more than $30.00. Court reporters are furnished by the court and by statute their services are taxed by the court at the rate of $4:00 per day.

A single referee may be appointed by the court in an appropriate case, but no referee may be appointed under the Ohio statutes in any disbarment proceeding. In all of these matters, including the assessment of substantial costs against the petitioner, the Supreme Court has undertaken to legislate without authority of law and contrary to existing statutes.

CONCLUSION.

The Supreme Court of Ohio is the first court of final jurisdiction in the United States to attempt, without statutory authority, to promulgate by rule of court a detailed procedure for the filing, hearing and determination of complaints against members of the bar and the basis for disciplinary action to be taken against members of the bar.

In the state of Ohio not only did the legislature fail to

provide the authority for devising and promulgating such procedure, but the Supreme Court undertook this step in the face of a form of procedure which had been specifically provided by legislation, and in the face of statutory safeguards provided for members of the bar as well as of the public which had been in effect for 133 years.

In no other state has any court attempted completely to disregard and utterly to nullify procedural provisions of any statute, regardless of the field of practice to which the statutory procedure may apply.

Bar associations throughout the country are observing closely, and with the greatest interest, the result of this unique and unprecedented experiment by the Ohio court. The members of this Court are, undoubtedly, fully aware of the concern with which bar associations throughout the country view the problem of discipline among the members of the bar.

If this unprecedented and unconstitutional attempt on the part of the Supreme Court of Ohio should succeed, simply because there is no authority to which the members of the bar of Ohio can appeal, and because the Supreme Court of the state of Ohio is, within the confines of that state, the final arbiter of the rights of all citizens of the state, including all members of the bar, it is clear that attempts will be made in many other states of the Union to follow the example of the Ohio court.

We believe that we have demonstrated that the people of the state of Ohio, through the provisions of both the present and the prior constitutions of the state, vested in the legislative branch of the government, the General Assembly of Ohio, full, complete and untrammeled authority to deal with any and every subject, including the practice of all of the professions.

We have demonstrated that from the earliest days of its existence, the people of the State of Ohio have established by legislative enactment a fixed policy and a declared procedure governing attorneys at law.

We have demonstrated the deficiencies in the court rule by virtue of which it fails to comply with the requirements of a fair hearing and of due process of law. And surely, again, as to these deficiencies, there is no other authority to whom the petitioner can appeal, and the action undertaken by the Supreme Court of Ohio will serve as a model for the courts of other states unless this Court raises an admonishing hand and declares that members of the bar are entitled to the same constitutional rights and privileges accorded to all other citizens of the United States.

We have, in the final analysis, we believe, demonstrated the prejudicial effects of all of the foregoing upon the petitioner in this case, including the peculiar inability of the petitioner to obtain any ruling from the Supreme Court of Ohio with respect to the jurisdictional basis for the action of that court upon which the complaint in this proceeding was grounded.

All of this appears even more significant when it is considered that, in fact, the petitioner defrauded no one and mistreated no one. Nevertheless, the Supreme Court of Ohio declared that the petitioner had deceived and defrauded a probate judge, in spite of the fact that the judge himself testified in this proceeding that the petitioner's conduct was regular and proper and that he, the judge, expected nothing of the petitioner in the case which the petitioner had not done.

The instant case is identified as case No. 1, on the Disciplinary Docket of the Supreme Court of Ohio. The

importance of this case, and of the issues involved, both to the Supreme Court of Ohio and to all members of the bar of that state, is evidenced by the following statement in a communication addressed by the clerk of that court to one of counsel for the petitioner:

> "In view of the importance of this case, and so there will be no mistake made in preparing the record for the Supreme Court of the United States, we request that you send us a praecipe which identifies the documents which you desire included in the record."

This is a land mark case.

Unless this Court intervenes, there is no recourse for this petitioner, or for any member of the bar of the State of Ohio, from the judicial legislation in which the Supreme Court of Ohio has indulged; for within the confines of the State of Ohio that court has the last word even though it amounts to the nullification of the statutes of the state.

Respectfully submitted,

EDWIN F. WOODLE,
Keith Bldg., Cleveland, Ohio,
WILLIAM J. CORRIGAN,
Williamson Bldg., Cleveland, Ohio,
CHARLES J. SMITH,
Leader Bldg., Cleveland, Ohio,
Attorneys for Petitioner.

APPENDIX.

RULE XXVII OF THE SUPREME COURT OF OHIO.

Pursuant to the powers of this Court over the Bar of this State and the members thereof, Rule XXVII is hereby amended, as follows, effective on January 1, 1957, and to remain in force until altered or abrogated.

(1) CREATION OF BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Distipline. Said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by any attorney or counselor at law or judge, or

(b) concerning practices of any attorney and counselor at law or judge, which tend to defeat the administration of justice or to bring the courts or the legal profession into disrepute, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this state.

(2) INVESTIGATIONS BY LOCAL OR STATE BAR COMMITTEES. Said Board of Commissioners on its own motion may cause to be instituted as to any such matters whatever investigation or action it deems proper by referring the matters to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

(3) APPOINTMENT OF BOARD OF COMMISSIONERS. Said Board of Commissioners shall consist of seventeen

(17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1*, comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2*, comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3*, comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4*, comprising Lucas County. *District 5*, comprising Crawford, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6*, comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7*, comprising Delaware, Franklin and Pickaway Counties. *District 8*, comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pike, Ross, Scioto and Vinton Counties. *District 9*, comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10*, comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. *District 11*, comprising Portage and Summit Counties. *District 12*, comprising Cuyahoga County. *District 13*, comprising Ashtabula, Columbiana, Geauga and Lake Counties. *District 14*, comprising Carroll, Mahoning, Stark, Trumbull and Tuscarawas Counties. *District 15*, comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16*, comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17*, comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three years, beginning on January 1 next following his appointment, except that the members appointed for Districts 1, 4, 7, 10 and 13, to take office January 1, 1957, shall be appointed for terms of one year each, and the members appointed for Districts 2, 5, 8, 11 and 14, to take office January 1, 1957, shall be

appointed for terms of two years each. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, who may, but need not, be a member.

(4) BOARD TO HAVE EXCLUSIVE JURISDICTION; AUTHORITY OF LOCAL COMMITTEES. From and after the effective date of this rule, all proceedings for the investigation of complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges, all proceedings for the discipline of such attorneys and counselors at law and judges, and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule; provided, however, that nothing herein contained shall be construed to prevent any committee of any regularly organized local bar association or of the Ohio State Bar Association from investigating and reporting on any complaint filed with it, referred to it, considered by it, or coming to its attention.

(5) DEFINITION OF MISCONDUCT. Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

(6) MANNER OF DISCIPLINE. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) EFFECT OF DISCIPLINE. A person disbarred shall never thereafter be readmitted to the practice of law in this state. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) THE COMPLAINT, BY WHOM SIGNED. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association

shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved.

(9) Duty of Board upon Filing of Complaint; Notice to Respondent; Time for Answer. All such complaints shall be filed in quadruplicate in the office of the Secretary of the Board of Commissioners. If said Board of Commissioners finds that the complaint, upon its face, does not charge misconduct as herein defined, such complaint shall be dismissed. Otherwise said Secretary forthwith shall cause a copy of such complaint to be sent by registered mail to the Respondent named therein with a notice requiring him to file within twenty (20) days after the mailing of such notice his answer in quadruplicate, and serve copies thereof upon counsel of record named in the complaint.

(10) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

(11) Duty of Panel if Charge Dismissed. If the panel finds that the charges in any complaint do not merit

the taking of disciplinary action, the complaint shall be dismissed, and such dismissal shall be reported to the Secretary of the Board of Commissioners, who shall notify the Respondent and all counsel of record of such action and shall notify the local bar association or associations of the County or Counties in which the Respondent resides and maintains his office, and of the County or Counties from which the complaint arose, of such action.

(12) PRIVATE REPRIMAND; DUTY OF PANEL. If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

(13) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF PANEL. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, indefinite suspension, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) REVIEW BY ENTIRE BOARD OF COMMISSIONERS; BOARD TO ADMINISTER PRIVATE REPRIMAND. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the

prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF BOARD AFTER REVIEW. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) SHOW CAUSE ORDER ISSUED BY THE COURT TO RESPONDENT. Upon the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause before this Court at a time to be specified not less than forty (40) days after the issuance of such order, why the report of said Board

of Commissioners shall not be confirmed and a disciplinary order entered. Notice thereof shall be served by the Clerk of this Court upon the Respondent and all counsel of record, personally or by registered mail.

(17) TIME FOR FILING OBJECTIONS BY RESPONDENT. At least twenty (20) days before the date for showing cause stated in the order of this Court, the Respondent shall file, in the number and form required by rules of this Court for original actions, objections, setting forth the grounds thereof, to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report upon which said order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof upon the Secretary of the Board of Commissioners and upon all counsel of record for the Relator in the hearing before the Board of Commissioners

(18) TIME FOR FILING BRIEFS BY RELATOR. Counsel for the Relator before the Board of Commissioners shall file or cause to be filed in the number and form required by the rules of this Court for original actions, such briefs as are deemed necessary in answer to any brief filed by Respondent, together with proof of service of copies thereof upon Respondent or counsel of record for Respondent. The same shall be filed within fifteen (15) days after the filing of Respondent's brief. Extension of time for filing objections and briefs shall be governed by rules applicable to original actions.

(19) REVIEW BY COURT; REIMBURSEMENT FOR EXPENSES OF BOARD; DUTY OF CLERK UPON ENTERING ORDER. Upon failure of Respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the

same, and after hearing, if requested by this Court, this Court shall enter such order upon the matter as it may find proper, which may include such provision for reimbursement of the actual and necessary expenses incurred by the Board of Commissioners in connection with said proceedings as the Court shall deem just. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent at his last known address, to the local bar association or associations in the County or Counties in which the Respondent resides and maintains his office and the County or Counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such County or Counties, and to the Presiding Judge of the United States District Court having jurisdiction in such County or Counties.

(20) PROCEEDINGS PRIVATE UNTIL FILED IN SUPREME COURT. Unless and until filed in the Supreme Court of Ohio, all proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private, unless the Respondent shall request in writing that they be public.

(21) PETITION FOR REINSTATEMENT, WHEN IT MAY BE FILED. No petition for reinstatement to the practice of law shall be entertained by this Court, and the same may not be filed in this Court, within a period of two years after the entry of an order indefinitely suspending the Petitioner from the practice of law in this State, or within a period of two years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) CONTENTS OF PETITION FOR REINSTATEMENT. Subject to the foregoing restrictions, any person who has

been indefinitely suspended from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when indefinite suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that

(i) he has rehabilitated himself, and.

(ii) possesses all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission.

(23) Costs To Be Deposited with Petition for Reinstatement. Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) REQUISITES FOR REINSTATEMENT; PASSAGE AT REGULAR BAR EXAMINATION. No person shall be reinstated unless he has established by clear and convincing evidence that

(a) he has rehabilitated himself, and

(b) possesses all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission. In such case the order of reinstatement shall

(i) permit the applicant to take one of the regular bar examinations of the Supreme Court of Ohio, and

(ii) be conditioned upon the applicant's subsequently taking and passing such examination and thereafter taking the prescribed oath of office.

(25) PETITION FOR REINSTATEMENT REFERRED TO BOARD OF COMMISSIONERS. Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) HEARING ON PETITION BY PANEL OF THREE; HEARING MAY BE PUBLIC; WHO MAY APPEAR; APPEAL TO COURT FROM DENIAL OF PETITION BY BOARD OF COMMISSIONERS. The Chairman of the Board of Commissioners shall appoint a hearing panel of three Commis-

sioners, no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension, and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in section 22(c) above. Such hearing shall be public if the Petitioner so requests in writing, and may be public in the discretion of the hearing panel. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition. The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court on an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed. If the final report should recommend denial of the petition, the Petitioner shall have ten days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof, but no oral argument shall be heard thereon. The Court shall thereupon enter an appropriate order, which may include such provision for reimbursement of the actual and necessary expenses incurred in connection with the proceedings as the Court shall deem just.

(27) MANNER OF SERVICE OF NOTICES, ETC. Whenever provision is made for the service of any notice, order,

report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) QUORUM OF PANEL OR BOARD. A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) CLERK IS AGENT FOR SERVICE OF NOTICES ON NONRESIDENT ATTORNEY. Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this rule.

(30) MANNER OF SERVICE ON CLERK; RECORD OF SUCH SERVICE NOT A PUBLIC RECORD. All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this

Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) EACH MEMBER OF BOARD TO HAVE POWER TO ISSUE SUBPOENAS. Each member of the Board of Commissioners shall have power to issue subpoenas and to cause testimony to be taken under oath. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners.

(32) MAY ORDER DEPOSITIONS. Any member of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) EFFECT OF REFUSAL TO TESTIFY. The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) RULES OF EVIDENCE. All rules of evidence shall be observed in the conduct of all hearings, and the Re-

spondent may be represented by counsel, who shall enter formal appearance.

(35) DOCKET OF COMPLAINTS. The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) BOARD MAY PRESCRIBE RULES. The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(37) RULE TO BE LIBERALLY CONSTRUED. The process and procedure under this rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objection, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any non-prejudicial irregularity or for any error not resulting is a miscarriage of justice. This rule and such regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this rule. To the extent that application of this amended rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended rule became effective shall continue to apply.

COMPLAINT FILED IN INSTANT CASE.

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF SUPREME COURT OF OHIO NO. 1.

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

CLEVELAND BAR ASSOCIATION,

Relator,

vs.

HENRY H. PLEASANT,

Respondent.

COMPLAINT.

Now comes the Cleveland Bar Association the relator herein and says that Henry H. Pleasant, the respondent, has been guilty of misconduct within the meaning of Rule 27, Paragraph 5, of the Supreme Court of Ohio as more specifically set forth in the case of In Re Estate of Wright, 165 Ohio St. 15.

WHEREFORE, relator prays that the respondent be served with notice of this complaint and a hearing be held within the terms of Rule 27 of the Supreme Court of Ohio.

OPINION OF THE SUPREME COURT OF OHIO IN WRIGHT CASE.

IN RE ESTATE OF WRIGHT: PLEASANT, APPELLEE, v. PERSKY ET AL., COMMITTEE, APPELLANTS.

1. It is a fundamental principle of law that, where parties having different interests are involved, no lawyer can represent or receive compensation from such parties without a full disclosure, to all the parties involved, of his dual representation and the arrangements as to the compensation to be received therefrom.
2. Where an attorney is administrator of an estate and is likewise acting as attorney in such administration, in the absence of a full disclosure concerning an arrangement for compensation from a claimant against the estate, and the consent of all interested parties, he impliedly represents that he has no such arrangement.
3. Where an attorney, who is administrator of an estate, enters into a contract with a claimant against such estate for a percentage of the proceeds which such claimant may receive from the estate, makes no disclosure of such arrangement to the Probate Court in whose jurisdiction such estate is being administered, and such court proceeds to confirm the final account of such administrator, which it probably would not have done had it known of the arrangement, such administrator thereby perpetrates a fraud upon the court, for which the order confirming the final account may be vacated and which may constitute a direct contempt upon the court punishable under Section 2705.01, Revised Code.

(No. 34403—Decided March 7, 1956.)

APPEAL from the Court of Appeals for Cuyahoga County.

There is no substantial dispute concerning the facts in the present case except as to inferences to be drawn from certain testimony.

On February 19, 1949, the Probate Court of Cuyahoga County appointed Henry H. Pleasant, administrator of the estate of William A. Wright, deceased. The administrator, appellee herein, is a member of the Cleveland bar, and he administered the estate with dispatch.

On September 23, 1949, he filed his final account which was approved on October 31, 1949.

On November 28, 1953, a committee of lawyers, acting on the request of the probate judge who was not in office during any of the time covered by the administration of the estate, filed in the Probate Court a motion captioned "motion to vacate order approving fiduciary's account."

The prayer of this motion is:

> "1. That the court vacate and set aside the order heretofore entered by it on October 31, 1949, upon the settlement of the fiduciary account.
>
> "2. That the court deny the said Henry H. Pleasant attorney fees and administrator commissions for not having faithfully discharged his duties.
>
> "3. That the court require the said Henry H. Pleasant to show cause why he should not be made to reimburse the estate of William A. Wright, deceased, the sum of $1,444.84 obtained by him while serving in the dual capacity of administrator of the estate of William A. Wright, deceased, and attorney and personal representative for William Wright as claimant against the estate without making full disclosure to the court of the existence of the contract between the said Henry H. Pleasant and William Wright and without prior knowledge, consent, or approval of the court.
>
> "4. That if, upon consideration of the evidence, the court finds that the acts and conduct of Henry H. Pleasant require further inquiry to determine whether such acts and conduct are in contempt of this court an order be made to institute appropriate proceedings."

After a protracted trial, the probate judge entered a judgment vacating the final settlement of the account of appellee and reopening the administration of the estate because of fraud upon the court; that appellee be denied the statutory fees and commissions; that he pay to Willis Wright, executor of the estate of William Wright, deceased, the sum of $233 and amend his final account accordingly, which shall then stand approved as the final account; that the claim of the executor of William Wright in the sum of $1,444.84, representing the amount paid by William Wright to appellee under an alleged agreement dated September 20, 1949, be denied; and that appellee be held in contempt of the court and fined the sum of $2,000.

Appellee appealed from the judgment of the Probate Court to the Court of Appeals, which court affirmed that part of the judgment of the Probate Court which vacated the order approving the final account of appellee and ordered the return of the statutory compensation, but reversed the judgment as to conviction of contempt and rendered final judgment in that respect in favor of appellee.

The cause is before this Court by reason of the allowance of a motion to certify the record, which motion was filed by Jack A. Persky, Victor DeMarco and John R. Kistner, *amici curiae* by appointment by Walter T. Kinder, Judge of the Probate Court of Cuyahoga County.

No cross-appeal was filed by appellee although he did file a cross-assignment of errors.

Additional facts are stated in the opinion.

STEWART, J. A query arises as to whether this Court may consider the cross-assignment of errors filed by appellee to the effect that the Court of Appeals was in error

in affirming the judgment of the Probate Court so far as it found that appellee committed a fraud upon the court, vacated the final account and ordered the return by appellee of the statutory fees he had received from the estate of William A. Wright, or whether we are confined to the question whether appellee was in direct contempt of the Probate Court by his conduct in the administration of the estate of William A. Wright.

One of the things essential to invoke the jurisdiction of this Court in an appeal from the Court of Appeals is a filing in that court of a notice of appeal within 20 days of the rendition of its judgment.

For the benefit of a party to a judgment of the Court of Appeals who does not wish to appeal from such judgment unless the opposing party does so, this Court adopted Section 1(C) of Rule II, which reads as follows:

> "A notice of cross-appeal may be filed in this court by an adverse party within the time provided by law for the filing of a notice of appeal. Provided, however, that such party may deposit his notice of cross-appeal with the clerk of the Court of Appeals or with an administrative board and with the clerk of this court, with instructions to said clerks or board to file such notice of cross-appeal upon the filing of notice of appeal by the appellant."

In 1945 the General Assembly enacted Section 12223-21a General Code, which reads:

> "Assignments of error may be filed on behalf of an appellee which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part. The time within which assignments of error on behalf of an appellee may be filed shall be fixed by rule of court."

This court has never passed upon the meaning or effect of this section, and the only comment upon it found

in the reports of cases decided by this court is in the opinion in *Winslow v. Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N. E. (2d), 504, where Judge Turner said:

> "The jurisdiction and duties of this court are fixed primarily by Section 2, Article IV of the Constitution of Ohio. Therefore, such statute is of doubtful constitutionality. However, it is not necessary for us to pass upon its constitutionality for the reason that it is the practice of this Court, before reversing or modifying the judgment of the Court of Appeals, to examine appellee's assignments of error which were pressed in the Court of Appeals and passed upon by that court as shown by the record certified to this court."

In view of the conclusion at which we have arrived, it is not necessary for us at this time to pass upon the question as to whether an appellee in this court saves his right of appeal by merely filing a cross-assignment of errors.

The Probate Court was the trier of the facts and it found the pertinent facts to be substantially as follows:

In his application for letters of administration, appellee named certain persons as next of kin, such persons being second cousins of decedent. William A. Wright. Within two weeks from appellee's appointment, there appeared at his office a man named William Wright who claimed to be first cousin of decedent William A. Wright.

On June 3, 1949, William Wright was found by the Probate Court to be the sole heir of William A. Wright.

On March 21, 1949, appellee filed a petition to determine heirship and, on the following day, a petition to sell real estate to pay debts. In these petitions the named defendants were the four second cousins of decedent and one Helen Paflovski who claimed to be the common-law wife of decedent. William Wright's name did not appear, although in both petitions there was added the phrase,

"unknown heirs, devisees, legatees, administrators, executors and assigns of William A. Wright, deceased."

In the Probate Court's opinion no satisfactory answer was given for appellee's failure to make William Wright a party-defendant and to accord him the same treatment as was accorded the second cousins and the alleged common-law wife, although William Wright had claimed to appellee to be a first cousin and should have been named party-defendant.

On March 23, and March 24, 1949, appellee filed affidavits to the effect that service could not be made on the unknown heirs, legatees, administrators, executors, devisees and assigns of decedent.

On May 24, 1949, William Wright first appeared and filed a waiver of summons, entry of appearance and consent in the heirship proceeding, and on June 3, on the hearing of the petition, an order was entered determining that William Wright was the sole heir of decedent.

In the proceeding to sell real estate, a waiver of summons and entry of appearance by William Wright was filed on May 24, 1949, and leave was given him to become a new party-defendant.

On June 3, the property was sold for $4,000, which constituted the greater part of the estate of decedent.

The Probate Court found from appellee's own testimony that of all the time spent in the administration of this estate, 10 hours would cover services which appellee claims to have personally rendered to William Wright as his attorney. Such services were limited to resistance of the claim of Helen Paflovski, alleged common-law wife of decedent, although appellee had denied this claim in May 1949. We may add, however, that appellee testified as to considerable services consisting of correspondence and

the securing of documents from England, establishing William Wright's relationship to decedent.

In coming to the conclusions at which it arrived, the Probate Court considered a written agreement entered into between William Wright and appellee, personally, on September 20, 1949, and it is largely from that agreement that it drew the inferences which determined the judgment it entered. That agreement is as follows:

> "Agreement made this 20th day of September, 1949, by and between William Wright (hereinafter called 'the client') and Henry H. Pleasant, attorney at law (hereinafter called 'the attorney'),
>
> "Witnesseth:
>
> "The client hereby had retained and employed Henry H. Pleasant to act for and on his behalf in various legal matters pertaining to the estate of William A. Wright.
>
> "In consideration for the services rendered by Henry H. Pleasant, the client had agreed and does hereby agree to pay said Henry H. Pleasant forty per cent (40%) of whatever sums the said William Wright receives from the estate of William A. Wright; and
>
> "Whereas, various legal transactions and dealings have and had taken place between William A. [*sic*] Wright and Henry H. Pleasant; and
>
> "Whereas, said William Wright has paid to Henry H. Pleasant the sum of one thousand four hundred and forty-four & 84/100 dollars ($1.444.84), this being forty per cent (40%) of the amount which the said William Wright received, to wit: three thousand six hundred twelve & 10/100 dollars ($3,612.10).
>
> "Now, therefore, in consideration of the payment of the sum of one thousand four hundred forty-four & 84/100 dollars ($1,444.84), the receipt of which is hereby acknowledged by Henry H. Pleasant and the

sum of two thousand one hundred sixty-seven & 26/100 dollars ($2,167.26) received by William Wright, the receipt of which is hereby acknowledged, each of the said parties hereto does hereby release and forever discharge the other, his executors and administrators, from all debts, claims, demands, actions and causes of action whatsoever from the beginning of the world to the date of these presents.

"In witness whereof, the parties hereunto set their hands this day and year first above written.

"In the presence of: (Signed) William Wright,
"(Signed) Mrs. E. Skelly (Signed) Henry H. Pleasant"

Because the agreement records transactions and understandings which had already occurred, it indicates, according to the Probate Court, that William Wright had previously employed appellee, personally, as his attorney to act for and in his behalf in reference to the estate of which appellee was then administrator; that it follows that the "legal transactions and dealings" recited in the contract could only be referable to the proceedings to determine heirship and to sell the real estate; and that the understanding as to employment between Wright and appellee, personally, was reached prior to and in connection with the proceeding to determine heirship, which explained the delay until May 24 in making William Wright a party-defendant, which date was only 10 days prior to the determination of Wright as the sole heir.

The Probate Court inferred and found from the evidence the formulation of a plan by appellee to ascertain to his satisfaction the real owner of the estate of William A. Wright, and thereupon to enter into an arrangement with William Wright for appellee's compensation upon the basis of 40 per cent of what William Wright should realize.

Appellee testified that, in connection with the hearing on the final account, he stated to the then probate judge that this was a case involving a sole heir and asked whether it would be proper for him to make his own agreement with the heir, and that the judge nodded his approval. However, appellee conceded that at no time did he disclose to the judge either the fact or the terms of his arrangement with William Wright.

The court frankly stated that it did not believe appellee's testimony that no arrangement was made until the execution of the contract of September 20, since all the facts, including the wording of the contract in the past tense, indicated a former oral arrangement.

Because appellee made no disclosure to any of the parties before the court or to the court itself of his arrangement with William Wright to collect from him 40 per cent of what he received from the estate, the court found appellee had committed a fraud upon it and a contempt of court.

It seems to us that, regardless of whether we would have drawn the same inferences from the testimony as did the Probate Court, that court as the trier of the facts was entitled to pass upon the credibility of appellee's testimony, and that the inferences the court drew could properly be drawn.

The Court of Appeals sustained the Probate Court in its factual findings, and, since this Co·· ·t does not ordinarily weigh evidence, we must take t · facts as found by the two courts below.

Although ordinarily we do not weigh evidence, we do examine the record to ascertain whether there is any evidence to substantiate a finding of a court below.

It is argued by appellee that there is no evidence of fraud upon his part; and that to constitute fraud the fol-

lowing elements must appear, to wit: a false representation, such misrepresentation must relate to a material existing fact, the person making the misrepresentation could have ascertained its falsity, the misrepresentation was intended to be relied on, and the person relying on the misrepresentation was damaged as a direct result thereof.

Do the facts as found by the Probate Court and sustained by the Court of Appeals fulfill this definition of fraud as presented by the appellee?

It is a fundamental principle of law that, where parties having different interests are involved, no lawyer can represent or receive compensation from such parties without a full disclosure, to all the parties involved, of his dual representation and the arrangements as to the compensation to be received therefrom.

Every lawyer worthy of the name learns this principle *ab initio*. In fact, it is indicated in the oath of office he takes upon his admission to the bar. It follows that, where one is acting as an administrator of an estate, his sole duty is to its proper administration, and he can not properly have an arrangement to represent a claimant against the estate without a full disclosure of such arrangement to the court and to all persons concerned in the estate, not only as to the terms of the arrangement but as to the compensation he is to receive therefrom.

Where one accepts an appointment as administrator of an estate he represents that he has no arrangement for compensation from any one concerned with the estate, in the absence of a full disclosure concerning such arrangement and the consent of all interested parties thereto. Certainly, such a representation relates to a material existing fact, and, if he is violating his duty, a lawyer making such representation knows of its falsity. Necessarily, the representation is intended to be relied upon, and the court in

relying upon it almost inevitably makes orders, such as fees paid from the estate, which it in all probability would not do had a full disclosure been made to it. If we must abide, as we do, by the finding of the facts by the trier thereof and as sustained by the Court of Appeals, we necessarily must sustain the finding of fraud upon the court by appellee.

We come now to the matter of contempt of court.

The Probate Court found that appellee's conduct constituted misbehavior in the presence of or so near the court as to obstruct the administration of justice, and that, therefore, it was authorized to penalize appellee summarily. (Section 2705.01, Revised Code.)

The Court of Appeals, on the other hand, held that apellee was not guilty of any direct contempt of court so as to be liable to summary punishment, and that he could not be found guilty of contempt except as a result of a charge, in writing, filed in accordance with Section 2705.03, Revised Code, for acts specified in Section 2705.02, Revised Code.

Appellee vehemently contends that in the trial of the present case he had no intimation that anything was to be considered except the vacating of his final account, and that he had no opportunity to defend against the charge of contempt of court. He contends that as a result he has been denied due process. However, the following colloquy occurred between counsel for appellee and the Probate Court at the conclusion of the evidence on behalf of appellants:

> "Mr. Corrigan: 'If the court please, I want to make a motion at this time, that the motion of both the committee, the *amici curiae*; and the motion of Willis Wright, be dismissed. [Willis Wright is the executor of the estate of William Wright, deceased, from whom

appellee secured 40 per cent of the proceeds received by William Wright from the estate, Willis Wright having intervened in the present hearing with a motion to recover the amount paid to appellee by William Wright, which motion the Probate Court overruled and from which no appeal has been taken.

" 'But I do want the court to reserve his ruling on that motion, because I do want to have the entire matter laid before the court, so that the court will understand entirely the relationship between this estate and this lawyer, and for that reason I will call to the stand Mr. Pleasant.'

"The Court: 'I will reserve my ruling on your motion so that the record will be protected, and I assume that in the defense of the case, that when you offer evidence, you are keeping in mind not only—and again what I am about to say is indicative of no conclusion that is to be drawn—but you will be keeping in mind the relief asked for here about the accounting for the executor's fees and accounting for the amount of money Mr. Pleasant received, and also along the lines that the motion invites the court to consider the matter of possible contempt.'

"Mr. Corrigan: 'Yes.'

"The Court: 'Very good. Had you finished?'

"Mr. Corrigan: 'Yes, I had finished.' "

It seems obvious that all parties were apprised that the matter of contempt of court was being tried along with the matter of the vacation of the final account.

Appellee contends, and the Court of Appeals held, that in order to constitute a direct contempt there must be an act the court itself witnesses, conduct so close to the courtroom that the judge can not avoid seeing or hearing it, or an act in the courtroom itself such as impedes or obstructs justice.

Appellee contends that, since he expeditiously administered the estate of William A. Wright, his contract to be

paid 40 per cent of the proceeds by the sole heir at law was not either an act in the presence of the court or one such as to obstruct justice.

In our opinion, a direct contempt of court is not confined to a disorderly or obstreperous act in the presence of the court itself. If the act constitutes a fraud upon the court and is such as to influence or persuade the court to make orders in its own courtroom, concerning which it probably would have done otherwise had the act not occurred, there is such an obstruction of justice as to constitute direct contempt.

It must be remembered that contempt of court is directed to the court itself rather than toward an individual judge thereof.

In the present case, if appellee had not represented a claimant against the estate of which he was administrator, he would have been entitled to receive his statutory administration fees and compensation for whatever extraordinary services he rendered, as fixed by the court. In the present case he received his statutory administration fees, made no application for attorney fees, and collected 40 per cent of the net estate from the person receiving it. Appellee contends that the 40 per cent he collected was in lieu of what the court would have allowed him anyhow for attorney fees and extraordinary expenses, but the flaw in such contention is that the court must fix the amount of such fees, and the attorney has no right to make contracts with claimants against the estate for the payment of fees which he fixes.

It is certain that a full disclosure to the court of his contract with the sole heir would have had a direct bearing on the action of the court in considering appellee's final account, and appellee was engaged in conduct obstructing justice in the court itself in failing to make a frank and

full disclosure, in failing to give the court full information as to his contract with the sole heir at the time such agreement was entered into, and in failing to obtain the consent to such agreement from all parties concerned in the administration of the estate.

An act need not be in the immediate presence of the court in order to constitute direct contempt, if it tends to obstruct justice or interfere with actions of the court in the courtroom itself.

Accordingly, the judgment of the Court of Appeals is reversed in part, and the judgment of the Probate Court is affirmed.

Judgment reversed in part.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, BELL and TAFT, JJ., concur.

OPINION OF THE SUPREME COURT OF OHIO IN INSTANT CASE.

CLEVELAND BAR ASSOCIATION v. PLEASANT.

1. The Supreme Court of Ohio has inherent power as to the disciplining of attorneys admitted to practice in this state and may provide by rule the procedure with reference to such disciplining.
2. Rule XXVII of the Supreme Court, as amended effective January 1, 1957, as it applies to procedure in reference to the exercise of original jurisdiction by the Supreme Court in the disciplining of attorneys, is constitutional.
3. Where an attorney is guilty of fraud upon the court, in his actions as an administrator of an estate and as an attorney for the heir of such estate, this court, acting within its inherent power, may discipline him.

(D. D. No. 1—Decided March 5, 1958.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The present cause is before this court upon objections to the final report of the Board of Commissioners on Grievances and Discipline, including its findings of fact and recommendations.

This court, having determined to exercise more fully original disciplinary powers over the Bar of this state and the members thereof, amended its Rule XXVII, effective January 1, 1957.

Under such amendment, the Board of Commissioners on Grievances and Discipline is set up, empowered and charged to receive, entertain, inquire into, take proofs, make findings, and submit recommendations to this court concerning complaints of misconduct of attorneys and concerning petitions for reinstatement as attorney. Such board is empowered to investigate upon its own motion

and refer any matters to a grievance committee of an appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

The commissioners are appointed by this court, one from each of 17 districts. The board has exclusive jurisdiction concerning the investigation of complaints and grievances as to attorneys and judges, and all proceedings for reinstatement of an attorney, although nothing is to be construed to prevent any committee of a regularly organized bar association or the Ohio State Bar Association from investigating and reporting on any complaint filed with either of them.

The rule defines misconduct as a violation of the oath of office taken upon admission to practice law, or as any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by this court from time to time, or as the commission of or conviction for a crime involving moral turpitude.

The following four grades of discipline are established:

(a) A permanent disbarment from the practice of law.

(b) Suspension for an indefinite period from the practice of law, subject to reinstatement upon certain conditions.

(c) A public reprimand.

(d) A private reprimand.

The rule sets forth the manner of making a complaint and the duty of the board upon the filing of the complaint as to notice to respondent and time for answer, provides for a hearing of the complaint by a panel of three commissioners, no one of whom shall be a resident of the district

from which the complaint originated, and sets forth the power of the panel to dismiss the complaint if found without merit or to administer a private reprimand. If the panel finds that a more severe disciplinary action is merited, it shall make a certified report, including its findings and recommendations, to the board of commissioners which must review such findings, and if the board finds that a public reprimand, suspension or disbarment is merited, the board shall make a final certified report of its proceeding, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken, with the clerk of this court. The rule then provides for the filing of objections to the report of the board by the one against whom the charges have been filed and for a review and final order in respect thereto by this court.

The rule provides further that all proceedings shall be private until filed in this court, unless the one against whom the charges are made shall request in writing that they be public.

The rule provides in detail for petitions for reinstatement and proceedings incident thereto, which provisions are not of importance in the present case.

The present case originated by the filing of charges by the Cleveland Bar Association against Henry H. Pleasant, and, after the matter was considered by the Board of Commissioners on Grievances and Discipline, that board made findings of fact and recommendations, as follows:

> "This matter came on for consideration before the Board of Commissioners on Grievances and Discipline on the pleadings, the evidence, the exhibits, on the briefs of counsel, and on the transcript of the proceedings before the hearing panel. Said board of commissioners hereby makes the following findings of fact:

"1. The respondent, Henry H. Pleasant, on February 19, 1949, was duly appointed by the Probate Court of Cuyahoga County as administrator of the estate of William A. Wright, deceased.

"2. The respondent also acted as attorney for the estate of William A. Wright, deceased.

"3. The respondent also represented, as attorney, one of the claimants, William Wright, who was later determined by the court to be the sole heir of the estate of William A. Wright, deceased.

"4. The respondent represented the claimant, William Wright, as attorney, from on or about the 15th day of March 1949, until the termination of said estate.

"5. The respondent at no time made full and complete disclosure to the judge or any officer of the Probate Court of Cuyahoga County of his representation of William Wright, claimant or sole heir of said estate.

"6. The respondent made a fee arrangement on a percentage basis with William Wright for a share of his recovery from the estate of William A. Wright, deceased, as evidenced by a written contract dated September 20, 1949, of which no disclosure was made.

"7. The respondent, as a result of his conduct with reference to said estate, was, as a matter of record, found guilty of perpetrating a fraud on the Probate Court of Cuyahoga County, which finding remains unreversed and unmodified.

"8. The respondent violated the statutory requirements provided for in Section 10509-193, Ohio General Code (Section 2113.36, Ohio Revised Code), relative to the further allowance of counsel fees to be charged against an estate.

"9. The respondent violated the established practice in the Probate Court of Cuyahoga County relative to the procedure pertaining to the allowance of counsel fees to be charged against an estate.

"10. It is therefore the determination of the board of commissioners that the respondent, Henry H. Pleasant, has violated Section 5 of Rule XXVII on disciplinary procedure of the Supreme Court of Ohio. The respondent is guilty of misconduct in that he violated his oath of office and the Canons of Professional Ethics, more particularly sections 6, 29, 32, and 38 of said canons.

"RECOMMENDATION

"The Board of Commissioners on Grievances and Discipline hereby recommends that the respondent, Henry H. Pleasant, be suspended from the practice of law for an indefinite period."

Henry H. Pleasant was admitted to the Bar of the state of Ohio in 1931 and has been practicing law ever since that date, except that in 1941 he was suspended from practice for eight months by the Common Pleas Court of Cuyahoga County.

In 1949, much of Pleasant's practice consisted of Probate Court work.

On February 16, 1949, one William A. Wright, whom Pleasant had known since 1944 but had never represented, died intestate.

A Bessie Hansen called Pleasant to come to a funeral home, which he did, taking with him an application for the appointment of an administrator. Upon arrival at the funeral home, he met Hansen and two others who claimed to be second cousins of the deceased. Pleasant had never before known these people and took it for granted that they were second cousins. These second cousins requested Pleasant that he be appointed administrator, they signed waivers on the application for appointment, and, on February 19, Pleasant obtained such appointment.

On February 20, Pleasant and the second cousins

went to the deceased's house to search for a possible will, bankbooks, or papers.

Shortly thereafter, a woman by tne name of Helen Pavloski came to Pleasant's office and claimed to have been the commonlaw wife of the deceased, and a few days later she returned with a young man whom she claimed was her son by the deceased.

Pleasant told her he would not recognize her claim and if she wished to press the matter she would have to obtain a lawyer and have the court decide.

On February 22, Pleasant prepared a petition to determine heirship, an application to determine succession tax, and a petition to sell real estate.

About two months after Pleasant's appointment as administrator, William Wright came to Pleasant's office and claimed to be a friend of the family. About 10 days later, Wright returned and claimed to be a first cousin of the deceased.

This happened between March 10 and 15.

The petition to determine heirship was not filed until March 21, 1949.

Pleasant did not advise Wright to obtain a lawyer to represent him as he had done with reference to Pavloski.

Pleasant wrote letters to England and elsewhere and eventually obtained a birth certificate on May 15, 1949, establishing that William Wright was the first cousin of the deceased.

On May 24, 1949, Pleasant amended his petition to determine heirship by adding, in longhand, the following, "Unknown heirs, devisees, legatees, administrators, executors of William A. Wright, deceased, and Agnes Boltz," and in addition the following was written, "William Wright, new party deft."

The petition to sell real estate, which was prepared on February 22, 1949, but not filed until March 22, 1949,

failed to set forth the claim and interest of William Wright as first cousin, but was amended May 24, 1949, by adding "William Wright, new defendant."

On June 3, 1949, there was a hearing on the petition to determine heirship, at which time William Wright was found to be the sole heir, and the real estate was ordered sold. On the same date, in Pleasant's office, William Wright discussed with him a new claim made by Pavloski for alleged services. Such claim had been filed on May 19, and, although Pleasant denied that he agreed to act as Wright's individual attorney, apparently, according to testimony Pleasant gave in a previous hearing, he had agreed to be Wright's lawyer with reference to the Pavloski claim.

On September 20, 1949, Pleasant and Wright signed an agreement, which stated that Wright *had* retained and employed Pleasant to act for and on his behalf in various legal matters pertaining to the estate of the deceased, and that Wright *had* agreed to pay Pleasant 40 per cent of whatever sums Wright might receive from the estate.

Based upon the wording of the agreement, an inference can be drawn that it was simply a written memorandum of an agreement entered into long before, and such inference, of course, is strengthened by the fact that, although Wright had told Pleasant before March 15 that he was a first cousin of the deceased, and the petition to determine heirship was filed on March 24, Wright was not made a defendant in such petition until May 24.

The final account filed in the administration of the estate shows administrator's fees of $235, and that William Wright was paid $3,612.10.

The final account was prepared on September 20, 1949, and, on September 21, Pleasant and Wright went to the Second Federal Savings & Loan, whereupon Wright was given a check for $3,612.10, Pleasant being designated

as the maker. The check was approved by an officer of the Second Federal Savings & Loan, and then two checks were issued, one to Pleasant for $1,444.84, being 40 per cent of $3,612.10, and the other to Wright for the balance of $2,167.26, or 60 per cent.

The final account does not show that Pleasant received 40 per cent of the estate, nor was it ever brought to the court's attention.

As a result of the proceedings in the settlement of the estate, the Probate Court of Cuyahoga County found that Pleasant had perpetrated fraud upon it, and he was held in contempt. The matter finally reached this court in the case of *In re Estate of Wright*, 165 Ohio St., 15, 133 N. E. (2d), 350, where this court held in the syllabus as follows:

"1. It is fundamental principle of law that, where parties having different interests are involved, no lawyer can represent or receive compensation from such parties without a full disclosure, to all the parties involved, of his dual representation and the arrangements as to the compensation to be received therefrom.

"2. Where an attorney is administrator of an estate and is likewise acting as attorney in such administration, in the absence of a full disclosure concerning an arrangement for compensation from a claimant against the estate and the consent of all interested parties, he impliedly represents that he has no such arrangement.

"3. Where an attorney, who is administrator of an estate, enters into a contract with a claimant against such estate for a percentage of the proceeds which such claimant may receive from the estate, makes no disclosure of such arrangement to the Probate Court in whose jurisdiction such estate is being administered, and such court proceeds to confirm the final account of such administrator, which it probably would not have done had it known of the arrange-

ment, such administrator thereby perpetrates a fraud upon the court, for which the order confirming the final account may be vacated and which may constitute a direct contempt upon the court punishable under Section 2705.01, Revised Code."

Pleasant has presented four objections to the finding of the Board of Commissioners on Grievances and Discipline:

"1. This entire procedure, it is humbly suggested, is based upon an erroneous assumption that respondent occupied an adverse position and represented adverse and conflicting interests.

"2. The panel, and all of the courts that have had anything to do with this matter, assumed the existence of a rule in the Probate Court of Cuyahoga County, which rule in fact did not exist.

"3. The respondent was not afforded a fair legal hearing before the panel inasmuch as he was not advised of the charges he was called upon to answer and certain requests and motions made by the respondent were never acted upon by the panel before, during, or after the hearing.

"4. The entire proceeding before the panel, as well as the rule of this court under which the proceeding was brought and conducted, is unconstitutional."

STEWART, J. As to objection No. 1, we are of the opinion that Pleasant is mistaken in his view that the entire procedure in this case is based upon the assumption that he occupied an adverse position and represented adverse and conflicting interests. He strenuously contends that in a proceeding to determine heirship there can really be no conflicting interests, the sole question being who is the heir, and that, therefore, in representing first cousin Wright he was in no sense hostile to the second cousins, who had called him originally and set in motion the pro-

ceedings to make him administrator of the estate. It is, however, a fact that Pleasant made an agreement to represent first cousin Wright and received from him 40 per cent of the entire proceeds of the estate, without letting the second cousins know of his relationship with Wright and without disclosing his arrangement to the court.

Pleasant, as the administrator, was entitled to represent himself as administrator and was likewise entitled to receive an allowance for legal services, both ordinary and extraordinary, but, nevertheless, such services should be paid for either by allowance by the Probate Court or after a full disclosure to the court as to any private arrangement he had with an heir of the estate to pay for such services. That he was found to have committed fraud upon the Probate Court was based upon the fact that he failed to disclose to the court or to any one else, except the person who had signed the contract with him, his arrangement to receive 40 per cent of the estate.

As to objection No. 2, Pleasant strenuously contends that the panel and the courts have assumed that there was a rule of the Cuyahoga County Probate Court requiring an attorney to report an attorney fee, and that the testimony demonstrates there was no such rule.

Assuming that such rule did not exist, there is a statute in Ohio, Section 2113.36, Revised Code (Section 10509-193, General Code), which reads in part as follows:

> "* * * When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration. The court may at any time during administration fix the amount of such fees and, on application of the executor or administrator or the attorney, shall fix the amount thereof. * * *"

It is obvious that the law of Ohio contemplates that the attorney fees in the administration of an estate shall be allowed and determined by the Probate Court, and, if they are to be paid under a contract with an heir of the estate, who is being represented by the administrator as attorney, such arrangement shall be disclosed to the Probate Court, not only because of the statute above referred to, but as a protection against any overreaching.

As to objection No. 3, that Pleasant was not advised of the charges he was called upon to answer, and that certain requests and motions made by him were never acted upon by the panel before, during, or after the hearing, we are of the opinion that there is no merit therein.

A reading of the record of the proceedings before the panel demonstrates that Pleasant and his counsel were fully aware of what they were called upon to meet.

Objection No. 4 is to the effect that Rule XXVII of this Court, under which the present proceeding was brought and conducted, is unconstitutional, and it is strenuously contended (1) that the Supreme Court may not by rule legislate or amend the statutes of Ohio and restrict the inherent power of a lower court; (2) that an attorney may not be deprived of his right to practice law without the right of hearing before any court in this state unless the Supreme Court permits such hearing; and (3) that the Supreme Court may not delegate its judicial powers to a board of commissioners with power to make final judicial determinations.

In reference to such contentions, this Court is firmly of the opinion that both the admission to the practice of law and the disciplining of those who have been admitted to practice are matters which come within the inherent powers of the judicial branch of the government, and that, although this Court recognizes that the legislative branch

may by statute provide standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend, or otherwise discipline attorneys for specified causes, such legislation is to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects. *In re McBride*, 164 Ohio St., 419, 132 N. E. (2d), 113.

In the case of *In re Thatcher*, 80 Ohio St., 492, 89 N. E., 39, this Court held that "the Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, resulting as an incident of its organization as a court, as well as from its power to admit to the Bar."

This pronouncement has never been questioned, except by a dictum in the opinion in the case of *In re Hawke*, 107 Ohio St., 341, 140 N. E., 583. This dictum was in no way related to the question before the court and was not carried into the syllabus of the case.

In the *Hawke* case, there had been a judgment of disbarment in the Court of Common Pleas, and it was claimed that there could be an appeal from that judgment as in a chancery proceeding. This Court held simply that there could be no such appeal, and that chancery cases do not now and never have comprehended proceedings for disbarment or suspension of attorneys at law. See, also, *In re Disbarment of Lieberman*, 163 Ohio St., 35, 125 N. E. (2d), 328.

Obviously, the whole matter with reference to the power to admit attorneys to the practice of law and to disbar, suspend, or otherwise discipline them after admission has been settled in the case of *In re McBride*, *supra*.

The first paragraph of the syllabus of the *McBride* case reads as follows:

> "The power to admit attorneys to the practice of law and to disbar, suspend, or otherwise discipline

them after admission rests inherently in the judicial branch of the government."

There can be no question now of the inherent power of this court as to the disciplining of attorneys and, therefore, of its power to provide by rule the procedure in reference to hearings upon such questions. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline. Such board or its panels have no power to discipline an attorney, except with reference to a private reprimand, and surely that can not constitute a judgment, for the power to give such a reprimand would be inherent without any authorization by this Court. As to any other disciplinary action, all that the board can do is to investigate and make findings of fact and recommendations, and the only order or decision is made solely by this Court.

As to the contention that, assuming that disbarment is a matter inherent in the judicial branch of the government, it must be inherent not only in the Supreme Court but likewise in all lower courts, Section 1, Article IV of the Ohio Constitution, reads:

> "The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, Courts of Probate, and such other courts inferior to the Courts of Appeals as may from time to time be established by law."

The contention that the Supreme Court can not deny the inherent power of Courts of Common Pleas, with reference to disciplinary actions against attorneys, would be a matter of concern if that question were before us. However, since the present case is one in which only the inherent power of the Supreme Court to discipline an attorney is concerned, and since Rule XXVII only concerns itself, so far as the matter is now before us, with the pro-

cedure for exercising disciplinary action before this Court, we are impelled to hold that there is nothing unconstitutional about the rule so far as it applies to the present case.

From what we have said, we overrule the objections to the final report of the Board of Commissioners on Grievances and Discipline, including the findings of fact and recommendations of such board, and confirm such report.

Report confirmed and judgment accordingly.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

(March 5, 1958.)

This cause came on to be heard upon the Objections by respondent to the Final Report of the Board of Commissioners on Grievances and Discipline and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Objections to the Final Report of the Board of Commissioners are not well taken and should not be sustained for the reasons stated in the opinion filed herein.

It is further ordered and adjudged that the Final Report of the Board of Commissioners on Grievances and Discipline be and the same hereby is, confirmed and the respondent, Henry H. Pleasant, is indefinitely suspended from the practice of law.

The respondent, Henry H. Pleasant, is commanded to desist and refrain from the practice of law, in any form, from this day forward, either as principal or agent or clerk or employee of another, and hereby is forbidden to appear in the State of Ohio as an attorney and counselor at law before any Court, judge, justice, board, commission or other public authority, and hereby is forbidden to give another an opinion as to the law or its application or advise with relation thereto.

It is further ordered that the respondent, Henry H. Pleasant, pay the costs of these proceedings taxed in the amount of $797.08.

It is further ordered that a copy of this entry be certified to all counsel of record, to the Board of Commissioners on Grievances and Discipline, to the respondent, to the Cleveland and Cuyahoga County Bar Associations and to the Presiding Judge of the United States District Court for the Northern District of Ohio and to the Presiding Judge of the Court of Common Pleas of Cuyahoga County.

In the Supreme Court of the United States

No. 125

OCTOBER TERM, 1958

HENRY H. PLEASANT,

Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. BURKE WESTON,
Terminal Tower, Cleveland, Ohio,

RUSSELL C. GRAHAME,
Midland Bldg., Cleveland, Ohio,

ROBERT J. GROGAN,
Leader Bldg., Cleveland, Ohio,

Attorneys for Respondent.

THE BYRON LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-6647

TABLE OF CONTENTS.

Facts 1

Issues 6

Argument 8

(1) Rule XXVII of the Supreme Court of Ohio Does Not Violate the Separation of Power Provisions of the Ohio or United States Constitutions 8

(2) Ohio Statutes Do Not Confer Judicial Powers on the Courts of Ohio 10

(3) The Supreme Court of Ohio, Having the Power to Admit Attorneys to Practice, Is the Only Body Which May Discipline, Remove and Reinstate Them 12

(4) Petitioner Has Not Been Deprived of His Rights Under the Fourteenth Amendment 16

No Constitutional Questions Actually are at Issue: the Supreme Court of Ohio Could Have Acted Sua Sponte to Disbar or Discipline Petitioner 18

Conclusion 19

TABLE OF AUTHORITIES.

Cases.

Baker v. Keisker, 142 N. E. 2d 132 14

Beakley, In Re, 107 P. 2d 1097 (1940) 11

Beamer v. Waddell, 45 N. E. 2nd 1020 (1943) 14

Brown, In re, 264 N. W. 521 (S. Ct. of S. D., 1936) 12

Bruen, In re, 172 P. 1152 1918) 12

Cleveland Bar Association v. Pleasant, 167 Ohio St. 325, 148 N. E. 2d 493 (1958) 1, 19, 20

Cornett v. State, 53 N. W. 2nd 747 (1952) 13

De Caro, In re, 262 N. W. 132 (S. Ct. of Iowa, 1935) 12

Delaware Optometric Corporation vs. Sherwood, 128 A. 2d 812 (S. Ct. of Dela., 1957) 12

Harrison, In re, 109 N. E. 2nd 722 (1953) 14

Illinois State Bar Ass'n vs. People's Stock Yards State Bank, 176 N. E. 901 (S. Ct. of Ill., 1931) 12

Mahoning County Bar Association v. Franko, 168 Ohio St. 17, N. E. 2nd (1958) 15, 19

McBride, In Re, 164 Ohio St. 419, 132 N. E. 2d 113 (1956) 9, 10, 12, 18, 19

Meck, In Re, 51 Ohio App. 237, 200 N. E. 478 (1935) 11

Morris, Ex Parte, 8 O. C. C. N. S. 212, N. E. (1906), 77 Ohio St. 598, 84 N. E. 1129 14

Opinion of the Justices, 180 N. E. 725 (Mass. Supreme Judicial Court, 1932) 12

Pate, In re, 107 S. W. 2nd 157 (1937) 13

Petition for Integration of the Bar of Minnesota, 12 N. W. 2nd 515 (1943) 13

Roon, In re, 75 N. E. 2d 278 (S. Ct. of Ill., 1947) 12

Strong, In Re, 27 O. C. A. 257 N. E. (1917) 11

Thatcher, In Re, 80 Ohio St. 492, 89 N. E. 39 (1909) 8, 18, 19

Watson, In re, 286 P. 2d 254 (S. Ct. of Nev., 1955) 12

Wright, In re Estate of, 165 Ohio St. 15, 133 N. E. (2d) 350 4, 5, 17, 18, 19

Law Review Article.

Woodbridge, Frederick, "A History of Separation of Powers in Ohio," 13 *U. C. R.* 191, pages 282-283 8-9

Constitutions.

Constitution of Minnesota 13

Constitution of Ohio:

Art. II, Sec. 1 8

Art. IV, Sec. 1 ..... 8, 13

Constitution of the United States, Amendment XIV 16

Constitution of Washington 13

Statutes and Rules.

Ohio Revised Code:

Sec. 4705.01 12

Secs. 4705.02-4705.04 ..... 8, 14

Canons of Professional Ethics, Sections 6, 29, 32, and 38 17

Rule XXVII of the Rules of Practice of the Supreme Court of Ohio 5, 6, 7, 8, 10, 11, 13, 14, 16, 18, 19, 20

In the Supreme Court of the United States

No. 125.
OCTOBER TERM, 1958.

HENRY H. PLEASANT,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FACTS.

Respondent cannot adopt petitioner's "statement of the case." Petitioner's statement of the facts contains much that is irrelevant and incorrect. Moreover, it is largely argumentative.

A precise and accurate statement of the facts is found in the opinion of the Supreme Court of Ohio in *The Cleveland Bar Association v. Pleasant*, 167 Ohio St. 325, 148 N. E. 2d 493 (1958). The Ohio Supreme Court summarized the facts as follows:

> "Henry H. Pleasant was admitted to the Bar of the state of Ohio in 1931 and has been practicing law ever since that date, except that in 1941 he was suspended from practice for eight months by the Common Pleas Court of Cuyahoga County.
>
> In 1949, much of Pleasant's practice consisted of Probate Court work.

On February 16, 1949, one William A. Wright, whom Pleasant had known since 1944 but had never represented, died intestate.

A Bessie Hansen called Pleasant to come to a funeral home, which he did, taking with him an application for the appointment of an administrator. Upon arrival at the funeral home, he met Hansen and two others who claimed to be second cousins of the deceased. Pleasant had never before known these people and took it for granted that they were second cousins. These second cousins requested Pleasant that he be appointed administrator, they signed waivers on the application for appointment, and, on February 19, Pleasant obtained such appointment.

On February 20, Pleasant and the second cousins went to the deceased's house to search for a possible will, bankbooks, or papers.

Shortly thereafter, a woman by the name of Helen Pavloski came to Pleasant's office and claimed to have been the commonlaw wife of the deceased, and a few days later she returned with a young man whom she claimed was her son by the deceased.

Pleasant told her he would not recognize her claim and if she wished to press the matter she would have to obtain a lawyer and have the court decide.

On February 22, Pleasant prepared a petition to determine heirship, an application to determine succession tax, and a petition to sell real estate.

About two months after Pleasant's appointment as administrator, William Wright came to Pleasant's office and claimed to be a friend of the family. About 10 days later, Wright returned and claimed to be a first cousin of the deceased.

This happened between March 10 and 15.

The petition to determine heirship was not filed until March 21, 1949.

Pleasant did not advise Wright to obtain a lawyer to represent him as he had done with reference to Pavloski.

Pleasant wrote letters to England and elsewhere and eventually obtained a birth certificate on May 15, 1949, establishing that William Wright was the first cousin of the deceased.

On May 24, 1949, Pleasant amended his petition to determine heirship by adding, in longhand, the following, 'Unknown heirs, devisees, legatees, administrators, executors of William A. Wright, deceased, and Agnes Boltz,' and in addition the following was written, 'William Wright, new party deft.'

The petition to sell real estate, which was prepared on February 22, 1949, but not filed until March 22, 1949, failed to set forth the claim and interest of Willian. Wright as first cousin, but was amended May 24, 1949, by adding 'William Wright, new defendant.'

On June 3, 1949, there was a hearing on the petition to determine heirship, at which time William Wright was found to be the sole heir, and the real estate was ordered sold. On the same date, in Pleasant's office, William Wright discussed with him a new claim made by Pavloski for alleged services. Such claim had been filed on May 19, and, although Pleasant denied that he agreed to act as Wright's individual attorney, apparently, according to testimony Pleasant gave in a previous hearing, he had agreed to be Wright's lawyer with reference to the Pavloski claim.

On September 20, 1949, Pleasant and Wright signed an agreement, which stated that Wright *had* retained and employed Pleasant to act for and on his behalf in various legal matters pertaining to the estate of the deceased, and that Wright *had* agreed to pay Pleasant 40 per cent of whatever sums Wright might receive from the estate.

Based upon the wording of the agreement, an inference can be drawn that it was simply a written memorandum of an agreement entered into long before, and such inference, of course, is strengthened by the fact that, although Wright had told Pleasant before March 15 that he was a first cousin of the deceased, and the petition to determine heirship was filed on March 24, Wright was not made a defendant in such petition until May 24.

The final account filed in the administration of the estate shows administrator's fees of $235, and that William Wright was paid $3,612.10.

The final account was prepared on September 20, 1949, and, on September 21, Pleasant and Wright went to the Second Federal Savings & Loan, whereupon Wright was given a check for $3,612.10, Pleasant being designated as the maker. The check was approved by an officer of the Second Federal Savings & Loan, and then two checks were issued, one to Pleasant for $1,444.84, being 40 per cent of $3,612.10, and the other to Wright for the balance of $2,167.26, or 60 per cent.

The final account does not show that Pleasant received 40 per cent of the estate, nor was it ever brought to the court's attention.

As a result of the proceedings in the settlement of the estate, the Probate Court of Cuyahoga County found that Pleasant had perpetrated fraud upon it, and he was held in contempt. The matter finally reached this Court in the case of *In re Estate of Wright*, 165 Ohio St., 15, 133 N. E. (2d), 350, where this Court held in the syllabus as follows:

"1. It is fundamental principle of law that, where parties having different interests are involved, no lawyer can represent or receive compensation from such parties without a full disclosure, to all the parties involved, of his dual representation

and the arrangements as to the compensation to be received therefrom.

'2. Where an attorney is administrator of an estate and is likewise acting as attorney in such administration, in the absence of a full disclosure concerning an arrangement for compensation from a claimant against the estate and the consent of all interested parties, he impliedly represents that he has no such arrangement.

'3. Where an attorney, who is administrator of an estate, enters into a contract with a claimant against such estate for a percentage of the proceeds which such claimant may receive from the estate, makes no disclosure of such arrangement to the Probate Court in whose jurisdiction such estate is being administered, and such court proceeds to confirm the final account of such administrator, which it probably would not have done had it known of the arrangement, such administrator thereby perpetrates a fraud upon the court, for which the order confirming the final account may be vacated and which may constitute a direct contempt upon the court punishable under Section 2705.01, Revised Code.'"

After the decision in the *Wright* case, *supra*, a committee appointed by The Cleveland Bar Association and acting for the Association filed a petition against Henry H. Pleasant pursuant to Rule XXVII of the Rules of Practice of the Supreme Court of Ohio. Under Rule XXVII a hearing was held by a panel of three, appointed by the Board of Commissioners on Grievances and Discipline. The panel recommended to the Board that the petitioner be suspended from the practice of law for an indefinite period of time. The Board then made findings of fact and a recommendation to the Supreme Court of Ohio that "Henry H.

Pleasant, be suspended from the practice of law for an indefinite period."

Subsequently the Supreme Court of Ohio issued an order upon Henry H. Pleasant to show cause why the recommendation of the Board should not be confirmed. Objections were filed and then briefs submitted by both petitioner and The Cleveland Ear Association. On March 5, 1958, following oral argument, the Supreme Court of Ohio confirmed the report of the Board and entered judgment accordingly.

The petitioner next filed an application for re-hearing before the Supreme Court of Ohio. The application was denied and subsequently the petitioner filed a petition for writ of certiorari in this Court.

ISSUES.

Petitioner's brief lists a vast number of questions for review, many of which are irrelevant to the issues of this case, quite apart from their relationship to any matter with which this Court would be concerned.

In summary, the petitioner contends (a) that the Supreme Court of Ohio has no power to act; (b) that Rule XXVII of the Supreme Court of Ohio is invalid, and (c) that the entire proceeding involving Henry H. Pleasant is unconstitutional.

It would extend this brief beyond reason to detail the inaccuracies with reference to the questions presented and comments in reference thereto. A few examples will suffice to indicate what we mean:

1. Contrary to the statement in 2(b), pages 3 and 4 of petitioner's brief, that the petitioner's right to appear before the Supreme Court is only a matter of grace, is

Paragraph 16 of Rule XXVII, pages 7(a) and 8(a) of petitioner's brief, which states that the Supreme Court of Ohio "*shall* issue to the Respondent an order to show cause" before the Supreme Court of Ohio "why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered."

2. Contrary to the statement in 2(d), page 4 of petitioner's brief, that "petitioner at no time may appear in person, or by counsel, before the Board of Commissioners," Paragraph 34 of the Rule provides that Respondent may be represented by counsel at all hearings, and Paragraph 14 of the Rule provides for further hearing before the Board, upon order of the Board.

The only issues pertinent to a petition for a writ of certiorari are:

1. Rule XXVII of the Supreme Court of Ohio does not violate the separation of power provisions of the Ohio or United States Constitutions.

2. Ohio statutes do not confer judicial powers upon the courts of Ohio.

3. The Supreme Court of Ohio, having power to admit attorneys to practice, is the only body which may discipline, remove and reinstate them.

4. Petitioner has not been deprived of his rights under the Fourteenth Amendment.

ARGUMENT.

(1) Rule XXVII of the Supreme Court of Ohio Does Not Violate the Separation of Power Provisions of the Ohio or United States Constitutions.

Petitioner contends that Rule XXVII usurps the legislative power, as expressed in Sections 4705.02-4705.04, Ohio Rev. Code.

Article IV, Section 1 of the constitution of Ohio reads:

> "The judicial power of the state is vested in the supreme court, courts of appeals, courts of common pleas, court of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law. (As amended 9/3/12.)"

By the same token, the legislative power is vested in the general assembly, pursuant to Article II, Section 1.

If Rule XXVII nullifies any one or all of the statutes, it is not unconstitutional. If respondent's contention is valid concerning nullification, it must be upon the theory that jurisdiction over affairs of disbarment and discipline of attorneys belongs to the legislature. There is no authority to support this contention. The authorities are to the contrary.

> "The Supreme Court of Ohio has inherent jurisdiction over proceedings to disbar an attorney resulting as an incident of its organization as a court, as well as from its power to admit to the bar." *In Re Thatcher*, 80 Ohio St. 492, 89 N. E. 39 (1909).

The report of the *Thatcher* case covers 183 pages. For our purposes here, we quote below an excellent summary from an article in the University of Cincinnati Law Review:

> "It has generally been held, in Ohio at least, that the power to admit to the bar, and to suspend or disbar from practice, is a judicial function. In 1909 one Thatcher was summoned to the bar of the Supreme

Court, and, after hearing, was ordered disbarred. He applied for reinstatement and was refused. Later he was disbarred in the Federal Courts. He then applied to the Legislature of Ohio for relief and that body passed an act conferring upon him all the powers of an attorney and counsellor at law. Subsequently, he appeared as counsel for a plaintiff in the Common Pleas Court of his county. The defense objected to his presence as attorney. On a hearing of this objection, the court held that the legislature could not exercise judicial power, and refused to allow him to appear as attorney in the court. He then applied to the Circuit Court for a writ of mandamus to The Common Pleas Court to require that court to permit him to practice. The Circuit Court refused to issue the writ, basing its decision upon the doctrine of separation of powers. It thus appears that the power of the courts to control the bar cannot be infringed by the legislature. However, the legislature may regulate the procedure by which disbarment proceedings shall be regulated." *Woodbridge, Frederick*, "A History of Separation of Powers in Ohio," 13 *U. C. R.* 191, pages 282-283.

The inherent power of the courts with reference to disbarment, suspension or discipline of attorneys was reaffirmed in *In Re McBride*, 164 Ohio St. 419, 132 N. E. 2d 113 (1956). The first four paragraphs of the syllabus read:

"1. The power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission rests inherently in the judicial branch of the government.

2. The legislative branch may provide by statute standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend or otherwise discipline attorneys for specified causes, but such legislation is

to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects.

3. Statutes authorizing the disbarment, suspension or discipline of attorneys on stated grounds do not operate as a restriction on the general powers of courts over attorneys, who are their officers, to disbar, suspend or otherwise discipline them on grounds other than those specified by statute.

4. The inherent powers of courts to disbar, suspend or otherwise discipline attorneys are not affected by recognizing and following the regulations and practice prescribed by statute on the subject."

Obviously, Rule XXVII does not violate the Ohio Constitution with reference to separation of powers.

(2) Ohio Statutes Do Not Confer Judicial Powers on the Courts of Ohio.

If the Ohio statutes above cited are interpreted as conferring judicial power on the Courts of Ohio, they are unconstitutional. The legislature may set forth procedures but, as we have seen, the power to discipline is inherently a judicial one.

While the Supreme Court of Ohio has recognized the legislature's right to set forth procedures and grounds for disbarment, it has recognized the legislative power as regulative only. As recently as 1956 in *In Re McBride*, *supra*, this Court held that statutory grounds for discipline or removal are not exclusive.

Although there may be conflict and lack of clarity in some of the decisions, some Ohio courts have held that the statutes are unconstitutional insofar as they confer original jurisdiction on the courts of appeal to disbar an attorney. The original jurisdiction of the courts of appeal is confined by the constitution to extraordinary actions.

See *In Re Strong*, 27 O. C. A. 257 ___ N. E. ___ (1917); *In Re Meck*, 51 Ohio App. 237, 200 N. E. 478 (1935).

The fact that the legislature has declared itself as a matter of general welfare and public policy that attorneys be disciplined for improper acts does not mean that it has the constitutional power to compel the courts to act or to compel them to act in a particular manner in the exercise of their judicial functions.

Rule XXVII, Paragraph 4, refers to "all proceedings" relative to the discipline of attorneys.

If this paragraph of the rule means that all disbarment proceedings must be brought only before the Board as provided under the rule or, if it is referring only to cases that are brought before the Board, then, in either case, it is not unconstitutional.

Nothing in the Rule takes away the right of the lower courts to entertain summary proceedings against attorneys for contempt. Moreover activity on the part of local bar associations is retained as an essential part of the rule.

In the case of *In Re Beakley*, 107 P. 2d 1097 (1940), the Supreme Court of Washington held that rules adopted by the Supreme Court succeed statutory procedures. In that case an attorney claimed that disbarment proceedings had been brought against him by virtue of a statute. He claimed the statute was unconstitutional because it made no provision for jury trial. The Supreme Court of Washington said at page 1098:

> "The proceedings against him were not carried on under those sections of the statute, but in accordance with the rules for discipline of attorneys adopted by the board of governors of the state bar association and approved by this court. * * * These rules succeed the statutory procedure of which respondent claims. * * *"

(3) The Supreme Court of Ohio, Having the Power to Admit Attorneys to Practice, Is the Only Body Which May Discipline, Remove and Reinstate Them.

As we have seen in the *McBride* case, *supra*, the Supreme Court of Ohio has inherent power to admit attorneys to the practice of law. Clearly this inherent power carries with it an exclusive power. This is even recognized by the legislature in Section 4705.01, Ohio Rev. Code. Obviously, should the legislature pass a statute endeavoring to take away such power from the Supreme Court, it is not difficult to imagine that such an effort would be declared unconstitutional.

It is inconceivable that the power to discipline, disbar and readmit attorneys should be left to a myriad of procedures in a myriad of bodies throughout the state.

Decisions in several other states likewise have confirmed the inherent power of their highest court.

In re Brown, 264 N. W. 521 (S. Ct. of S. D., 1936); *In re De Caro*, 262 N. W. 132 (S. Ct. of Iowa, 1935); *Illinois State Bar Ass'n vs. People's Stock Yards State Bank*, 176 N. E. 901 (S. Ct. of Ill., 1931); *Delaware Optometric Corporation vs. Sherwood*, 128 A. 2d 812 (S. Ct. of Dela., 1957); *In re Roon*, 75 N. E. 2d 278 (S. Ct. of Ill., 1947); *In re Watson*, 296 P. 2d 254 (S. Ct. of Nev., 1955); *Opinion of the Justices*, 180 N. E. 725 (Mass. Supreme Judicial Court, 1932).

An analogous situation to the one before us occurred in *In re Bruen*, 172 P. 1152 (1918). The Supreme Court of Washington considered the validity of an act of the legislature which gave to the Board of Law Examiners the power to render a final order of disbarment. The court held that the legislative act was unconstitutional insofar as it granted such power to the Board and held that the

Board's power would be confined to hearings and recommendations to the Supreme Court.

In overruling a previous case the Court said at page 1155:

> "We are of the opinion that this court, having been exclusively vested with the power of admitting attorneys to practice, may also be exclusively vested with the power of disbarring attorneys from practice."

Surely, the legislature must be limited to establishing procedures that are related to the power that the Supreme Court of Ohio decides to exercise in matters of disbarment and discipline. The inherent power of that Court carries with it the power to state and enforce Rule XXVII.

See also *Cornett v. State*, 53 N. W. 2nd 747 (1952) in which the Supreme Court of Nebraska held that it has the "exclusive power to disbar licensed attorneys who had violated the trust reposed in them as such."

The Supreme Court of Missouri also has promulgated rules for the discipline of attorneys. The procedure under said rules varies little from that adopted by Rule XXVII except that bar association committees may file complaints with the district court. In *In re Pate*, 107 S. W. 2nd 157 (1937) the Court of Appeals said that the Supreme Court of Missouri "has the right to delegate to the inferior tribunals of record of this state" the trial of matters involving complaints against attorneys "in accordance with the rules of procedure adopted by it. * * *"

The Judicial Articles of the Constitutions of the states of Washington and Minnesota are almost identical to Article IV, Section 1 of the Ohio Constitution, *supra*.

In *Petition for Integration of the Bar of Minnesota*, 12 N. W. 2nd 515 (1943), the Supreme Court of Minnesota said:

"The fundamental functions of the Court are the administration of justice and the protection of the rights guaranteed by the constitution. To effectively perform such functions, as well as those other ordinary duties, it is essenial that the court have the assistance and cooperation of an able, vigorous and honorable bar. It follows that the Court has not only the power, but the responsibility as well, to make any reasonable orders, rules, or regulations which will aid in bringing this about, and that the making of regulations and rules governing the legal profession falls squarely within the judicial power thus exclusively reserved to this Court."

The power to admit carries with it the power to suspend or disbar under such conditions as the Supreme Court of Ohio may, in its judicial discretion deem justifiable.

See *Beamer v. Waddell*, 45 N. E. 2nd 1020 (1943); *In re Harrison*, 109 N. E. 2nd 722 (1953); *Baker v. Keisker*, 142 N. E. 2nd 132, all decisions of the Supreme Court of Indiana.

Counsel for petitioner cite *Ex Parte Morris*, 8 O. C. C. N. S. 212, N. E. . (1906), affirmed without opinion in 77 Ohio St. 598, 84 N. E. 1129, which involved a question of contempt. That case held that it is the duty of the courts "to conform to a statute which does not abridge this (inherent) power but simply points out the manner in which it shall be exercised." We agree that the courts must conform to statutes where the statutes *do not abridge the inherent powers of the courts*. In this case, as in all matters of disbarment and discipline, the Supreme Court of Ohio has inherent power. This power permits it to establish the procedures represented by Rule XXVII. If Rule XXVII is in conflict with Sections 4705.02-4705.04 Ohio Rev. Code, then said statutes abridge the inherent power of the court.

The inherent power of the Supreme Court of Ohio over proceedings relating to the discipline of attorneys was re-iterated recently in *Mahoning County Bar Association vs. Franko*, 168 Ohio St. 17, N. E. 2nd (1958). The pertinent portions of the syllabus state:

"1. The Supreme Court of Ohio has inherent exclusive jurisdiction over the admission to the practice of law in Ohio. (Rule XIV, Rules of Practice of the Supreme Court of Ohio.)

2. The legal profession of Ohio includes every person who has been admitted to the practice of law in this state, by and under the rules for admittance thereto as adopted by the Supreme Court of Ohio, whose name is maintained on the Roll of Attorneys kept by such court, regardless of the subsequent capacity or status of such person.

3. The Supreme Court of Ohio has inherent jurisdiction over proceedings relating to the disciplining of members of the legal profession of this state, resulting from the Supreme Court's organization as such as well as from its inherent exclusive power of admission, and it may provide by rule both the basis for and the procedure to be followed with reference to such disciplining. (Paragraph one of the syllabus of *In re Thatcher*, 80 Ohio St., 492, and *Cleveland Bar Association v. Pleasant*, 167 Ohio St., 325, approved and followed.)

4. Rule XXVII of the Rules of Practice of the Supreme Court of Ohio provides a comprehensive procedure to activate the inherent duty and to implement the inherent power of that court to supervise the disciplining of members of the legal profession of Ohio."

(4) Petitioner Has Not Been Deprived of his Rights Under the Fourteenth Amendment.

The only specific reference to the Fourteenth Amendment appears on page 3 of petitioner's brief in the statement of questions for review, wherein petitioner contends that the Supreme Court of Ohio has deprived him of his constitutional rights without due process of law.

Throughout his brief petitioner complains about Rule XXVII as being unfair. As this Court will note, the rule provides all of the essential safeguards of justice and fair play in administrative and judicial matters. There is due provision for notice upon the respondent, full opportunity for a hearing and complete opportunity for review.

The desperation of petitioner's complaint about the rule is well demonstrated, by way of example, in the statement on page 53 of his brief when it is said:

> "There is no provision in the rule that the hearings conducted by the panel selected by the chairman of the Board of Commissioners shall be conducted in accordance with the rules of evidence, or that the hearings shall be conducted in a manner consonant with the requirements of a fair hearing as contemplated within the meaning of due process of law."

On the contrary, Paragraph 34 of Rule XXVII states:

> "*Rules of evidence.* All rules of evidence shall be observed in the conduct of all hearings and the respondent may be represented by counsel, who shall enter formal appearance."

Not only was the original panel chairmanned by a former judge but the other two members also are eminent lawyers in the State of Ohio. Indeed, the petitioner's counsel was so impressed with the fair conduct of the hearing that open acknowledgment was made of this fact, both by affirmative

comment and lack of any objection during the entire proceedings. The petitioner and his counsel recognized that the hearings were conducted in the highest tradition of judicial conduct.

Petitioner was charged with nothing new. More than anyone he was aware of all of the proceedings that led to the decision of the Supreme Court of Ohio in the *Wright* case, *supra*. At the hearing before the panel he produced evidence, without any complaint that he was caught by surprise or unable to proceed because of any lack of knowledge as to the nature of the charges against him.

The petitioner has gone to great length in making a collateral attack upon the *Wright* case on the ground that it was instituted by *amici curiae*. This is a new theory offered by the petitioner in the hope of avoiding suspension by the Supreme Court of Ohio. It is unnecessary to determine the validity of the argument in regard to *amici curiae* because the original complaint filed by the Cleveland Bar Association was founded not only upon the *Wright* case but also it charged that the petitioner was "guilty of misconduct within the meaning of Rule 27, paragraph 5 of the Supreme Court of Ohio."

Moreover, at the beginning of the hearing before the panel in response to a request by counsel for respondent, the petitioner was advised specifically that he had violated Sections 6, 29, 32, and 38 of the Canons of Professional Ethics.

NO CONSTITUTIONAL QUESTIONS ACTUALLY ARE AT ISSUE: THE SUPREME COURT OF OHIO COULD HAVE ACTED SUA SPONTE TO DISBAR OR DISCIPLINE PETITIONER.

The Supreme Court of Ohio had the right to act *sua sponte* to suspend Henry H. Pleasant, even if Rule XXVII did not exist.

This proceeding grew out of the decision of Supreme Court of Ohio in the *Wright* case, *supra*. In rendering that decision that Court said:

> "If we must abide, as we do, by the finding of the facts by the trier thereof and as sustained by the Court of Appeals, we necessarily must sustain the finding of fraud upon the Court by appellee."

Moreover, in regard to the matter of contempt, the Court further said:

> "In our opinion, a direct contempt of court is not confined to a disorderly or obstreperous act in the presence of the court itself. If the act constitutes a fraud upon the court and is such as to influence or persuade the court to make orders in its own courtroom, concerning which it probably would have done otherwise had the act not occurred, there is such an obstruction of justice as to constitute direct contempt.
>
> It must be remembered that contempt of court is directed to the court itself rather than toward an individual judge thereof."

In the *Thatcher* case, *supra*, the Supreme Court of Ohio said it "* * * has inherent jurisdiction of proceedings to disbar an attorney * * *." In the *McBride* case, *supra*, the Supreme Court of Ohio said that the power to admit attorneys "* * * and to disbar, suspend or otherwise discipline them after admission rest inherently in the judicial branch of the government."

If we combine the findings in the *Wright* case and the holdings in the *Thatcher*, *McBride* and *Franko* cases, they add up to the right of the Supreme Court of Ohio to act *sua sponte* to disbar or indefinitely suspend Henry H. Pleasant, regardless of any of the contentions of the petitioner in reference to Rule XXVII.

The Supreme Court of Ohio itself recognized its power to act *sua sponte* when it said in the *Pleasant* case:

> "The contention that the Supreme Court can not deny the inherent power of Courts of Common Pleas, with reference to disciplinary actions against attorneys, would be a matter of concern if that question were before us. However, since the present case is one in which only the inherent power of the Supreme Court to discipline an attorney is concerned, and since Rule XXVII only concerns itself, so far as the matter is now before us, with the procedure for exercising disciplinary action before this Court, we are impelled to hold that there is nothing unconstitutional about the rule so far as it applies to the present case."

CONCLUSION.

1. In 1940 Henry H. Pleasant was suspended by the Common Pleas Court of Cuyahoga County.

2. Based upon actions that took place in 1949 the Probate Court and Court of Appeals of Cuyahoga County and the Supreme Court of Ohio found respondent guilty of fraud upon the Probate Court. The Probate Court and the Supreme Court of Ohio likewise found that he was guilty of contempt.

3. Based upon a decision of the Supreme Court of Ohio in the *Wright* case in 1956 proceedings were instituted under Rule XXVII. As a result, under the procedures prescribed by that Rule, the Board recommended

to the Court that petitioner "be suspended from the practice of law for an indefinite period."

4. The recommendation of the Board was confirmed by the Supreme Court of Ohio in the *Pleasant* case.

5. Rule XXVII meets all of the requirements of due process and is not in conflict with the statutes and Constitution of the State of Ohio.

6. Quite apart from any constitutional issues, in regard to Rule XXVII, the Supreme Court of Ohio had the right, in this instance, to exercise its inherent power to discipline Henry H. Pleasant.

The law is an old and essential profession. Its standards, like Caesar's wife, should be above reproach. Its members should be above suspicion. The law touches the lives of all men. Lawyers are officers of the court. Lawyers share a major responsibility in the administration of justice. Justice is not served if their conduct transgresses their oath or their canons of professional ethics.

The courts have an obligation to reassure a sometimes cynical general public that no lawyer may be found guilty of perpetrating a fraud upon a court and continue to hold himself out as a member of a profession he has dishonored.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

S. Burns Weston,
Terminal Tower, Cleveland, Ohio,

Russell C. Grahame,
Midland Bldg., Cleveland, Ohio,

Robert J. Grogan,
Leader Bldg., Cleveland, Ohio,

Attorneys for Respondent.

ILE COPY

Supreme Court, U.S.
FILED
SEP 18 1958
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. 125.

OCTOBER TERM, 1958.

HENRY H PLEASANT,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

MOTION OF CUYAHOGA COUNTY BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

JUDGE ARTHUR KRAUSE,
Public Square Bldg., Cleveland, Ohio,
EDWARD CHITLIK,
Leader Bldg., Cleveland, Ohio,
JOHN J. McMAHON,
Leader Bldg., Cleveland, Ohio,
Special Counsel for Cuyahoga County Bar Association.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

In the Supreme Court of the United States

No. 125.

OCTOBER TERM, 1958.

HENRY H. PLEASANT,

Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,

Respondent.

MOTION OF CUYAHOGA COUNTY BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Now comes the Cuyahoga County Bar Association and respectfully moves the Court for an order authorizing it to file a brief amicus curiae in the within cause.

The Association says that it has heretofore procured the consent of the petitioner to file a brief amicus curiae herein. On July 24, 1958, the Association requested of the respondent, the Cleveland Bar Association, consent to file such a brief, and having received no response to the request addressed by it to the Cleveland Bar Association, subsequently again applied to the respondent for such consent. The respondent has refused to reply to the request of the Association, but the Association has been advised informally and orally that its request for consent to file a brief amicus curiae has not been and will not be granted by the respondent, the Cleveland Bar Association. The Association has also been advised informally that a similar request addressed to the Cleveland Bar Association by the Ohio State Bar Association for consent to file a

brief amicus curiae has also been refused by the respondent.

The Association says that the within cause involves basic and important questions of Federal Constitutional Law, the determination of which will materially affect every member of the Bar of the State of Ohio.

The Association has been in existence since 1928 as a duly incorporated Bar Association, and has for the past thirty years taken an active part in all matters relating to the administration of justice in the County of Cuyahoga and in the City of Cleveland, where its headquarters are maintained. The Association appeared and filed a brief amicus curiae before the Supreme Court of Ohio when this cause was pending before that Court for determination. At that time, as well as upon other appropriate occasions, the Association has set forth and documented its view that Rule 27 of the Supreme Court of Ohio has been adopted and is being enforced in violation of the constitutional rights of the members of the Bar of Ohio.

The Association believes that the refusal of the Cleveland Bar Association, to consent to the filing of a brief amicus curiae by this Association, as well as the respondent's refusal to grant the request of the Ohio State Bar Association, is entirely without precedent, and asserts that such consent is commonly and universally granted by one Bar Association to another not only as a matter of courtesy but as a matter of right in all proceedings in which Bar Associations have a common interest.

The Association represents a membership of more than eighteen hundred lawyers. It believes that the refusal of the respondent to give its consent is improper and cannot be justified by the respondent, which appears also in a representative capacity on behalf of members of the Bar of the State of Ohio.

The Association respectfully urges that the Court grant this Motion and permit it to present to the Court the views which it has adopted upon a subject of the utmost importance to every member of the Bar of this state.

Respectfully submitted,

JUDGE ARTHUR KRAUSE,
Public Square Bldg., Cleveland, Ohio,

EDWARD CHITLIK,
Leader Bldg., Cleveland, Ohio,

JOHN J. McMAHON,
Leader Bldg., Cleveland, Ohio,

Special Counsel for Cuyahoga County Bar Association.

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 27 1958
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. 125.

OCTOBER TERM, 1958.

HENRY H. PLEASANT,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

REPLY BRIEF FOR PETITIONER.

EDWIN F. WOODLE,
Keith Bldg., Cleveland, Ohio,

WILLIAM J. CORRIGAN,
Williamson Bldg., Cleveland, Ohio,

CHARLES J. SMITH,
Leader Bldg., Cleveland, Ohio,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

Facts 1

The Conflict Between the Court and the Legislature 8

TABLE OF AUTHORITIES.

Cases.

Colorado Bar Association, Petition of the, 325 Pac. 2d 932 ..... 9, 10

Lyles vs. The State of Oklahoma, Criminal Court of Appeals of Oklahoma, September 3, 1958 8

McBride, In Re, 164 O. S. 419, 132 N. E. 2d 113, cert. den. 351 U. S. 965, 76 S. Ct. 1030 ..... 9, 10

Statute.

Ohio Revised Code Sec. 4705.02 10

Rules of the Supreme Court of Ohio.

Rule 27 2

In the Supreme Court of the United States

No. 125.

OCTOBER TERM, 1958.

HENRY H. PLEASANT,

Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,

Respondent.

REPLY BRIEF FOR PETITIONER.

This reply brief is submitted for three reasons: first, to dispel any confusion resulting from apparent discrepancies in the facts as presented by the petitioner and respondent, as well as by certain inaccuracies in the respondent's brief; second, to emphasize the significance of a constitutional issue which the respondent has failed to controvert; third, to direct to the attention of the court a decision by the Criminal Court of Appeals of the State of Oklahoma, rendered on September 3, 1958, after all of the prior briefs in this case had been filed, which has an important bearing on one of the vital constitutional questions involved in this case.

FACTS.

The respondent charges the petitioner with "inaccuracies" in the presentation of the facts and undertakes to fortify its charge with two examples cited on pages 6 and 7 of respondent's brief. Such charges, particularly when made by a bar association, should not be permitted to go unchallenged when they are incorrect and without foundation.

Respondent denies the petitioner's assertions that under the provisions of Rule 27 of the Supreme Court of Ohio, the petitioner's right to appear before that court is only a matter of grace. Section 19 of that Rule, set forth on page 8a of the appendix to the petition, states:

> "Upon failure of respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the same, *and after hearing, if requested by this court,* this court shall enter such order upon the matter as it may find proper * * *."

This language makes it clear that not only is the appearance of the petitioner himself a matter of grace, subject to a "request" of the court, but the very right to a hearing before the court itself and the appearance of petitioner's counsel before that court, is a matter of grace which may take place only "if requested by (the) court."

Respondent denies the petitioner's assertion that under the provisions of Rule 27 petitioner has no right to appear in person or by counsel before the Board of Commissioners. Section 14 of the Supreme Court Rule (App. 6a) provides that:

> "Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing, or may order a further hearing to be presented before said Board of Commissioners, or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the respondent is guilty of misconduct."

While the petitioner and his counsel may have a right to appear before the Board of Commissioners *if* the Board orders "a further hearing," it is a matter of record in this case that neither the petitioner nor his counsel at any

time were accorded the right to appear before the Board. And, of course, it cannot be disputed that under the language of the above rule the right of the petitioner to appear before the Board is purely a matter of grace, subject to an order for a further hearing in the event the Board of Commissioners is so inclined.

It is contended that no statute and no rule accords a party due process of law unless the party may appear in person, as a matter of right, as well as be represented by counsel before a court, a board or an agency, which has been vested with the power to determine questions of law or of fact affecting the life, liberty or the property of such party. If the appearance before the court, the board or the agency is purely a matter of grace and may be denied at will, the requirements of due process of law have not been filled.

It is a matter of record in this case that the petitioner and his counsel appeared only before three members of the seventeen-member Board of Commissioners, and that no hearing before the Board of Commissioners was ever had. The only persons who heard the petitioner in this case were a panel of hearing members twice removed from the authority of the Supreme Court of Ohio and appointed not by that Court, but by the elected chairman of the Board of Commissioners.

We trust that the foregoing will dispel any confusion resulting from a denial of statements in the petition which are, in fact, correct.

Incorporated as the respondent's presentation of the "facts" is the opinion of the Supreme Court of Ohio in the instant case. Included therein is the quotation by that Court of its syllabus in the prior related case of *In Re Estate of Wright*. The implication necessarily resulting

from this manner of presentation is that the evidence in the *Wright* case and in the case at bar was the same. Again, this is incorrect.

The complaint filed by the respondent in this case charging the petitioner with having committed a fraud upon the Probate Court, is based upon the finding by the Supreme Court of Ohio set forth in the third paragraph of the syllabus in the *Wright* case (p. 5 respondent's brief). The Supreme Court declared in the *Wright* case that where an attorney, who is also an administrator of an estate, enters into a contract for fees which are to be paid by a sole heir out of what he receives from the estate, in filing his account, "makes no disclosure of such arrangement to the Probate Court in whose jurisdiction such estate is being administered, and such court proceeds to confirm the final account of such administrator, *which it probably would not have done had it known of the arrangement*, such administrator thereby perpetrates a fraud upon the court."

It is obvious from the language employed by the Supreme Court of Ohio in the *Wright* case that it was indulging in conjecture as to what the Probate Court "probably would not have done had it known of the arrangement."

In this case, the petitioner presented as one of his own witnesses the Probate Judge to whom he had submitted his account. The Probate Judge after examining the account on the witness stand, declared that no fraud had been committed upon the court and that if he had known of the arrangement made between the petitioner and his client, it would have made no difference whatsoever to him, as Judge of the Probate Court, and he would have made no different ruling, but would have confirmed the account precisely as he did.

One of the important constitutional questions presented in this case results from the pronouncement by the Supreme Court of Ohio in 1958, of what is stated by the court to be a rule of law in Ohio, which was wholly unknown to the bench and to the bar when the petitioner filed his account with the Probate Court in 1949. By applying this rule of law to the conduct of the petitioner nine years earlier when the petitioner had no reason to believe or to know that such a rule existed, the Supreme Court of Ohio has deprived the petitioner of his right to practice law, without due process of law, as surely as if the same result had been achieved by means of retroactively enforced legislation. This contention, set forth in the petition, has not been controverted by the respondent.

This constitutional question is inextricably bound to the finding of fraud upon which the charges against the petitioner were based and sustained. Dozens of pages of the record of testimony before the hearing panel were devoted to an attempt to establish that there was a rule of the Probate Court, or a "requirement" of the court, or some "practice" compelling the petitioner, as administrator, to include in his account to the court the omitted item of attorney fees.

It must be apparent that if there had been in effect in Ohio in 1949 a statute which was known to the bench and to the bar as the source of a requirement compelling the petitioner to include in his account the fee received by him from his client, it would have been both unnecessary and futile to devote to this issue the extraordinary amount of testimony appearing in the record.

This brief, of course, provides no appropriate opportunity for a full discussion of the proposition. A few brief illustrations will serve to clarify the petitioner's plight. From the testimony of Nelson J. Brewer, the Probate

Judge to whom the petitioner's account was rendered, we quote:

Page 274:

"Q. I will ask you whether or not on September 20th of the year 1949, or on September 23, 1949, if there was any rule of the Probate Court of Cuyahoga County, requiring a fiduciary, acting in a dual capacity, both as the administrator of the estate and as the attorney thereof, to show in his final account what fees he charged?

A. I know of no such rule.

Q. Assuming, Judge Brewer, that the evidence in this case would show that the respondent, Henry H. Pleasant, spent 125 to 130 hours, both in his capacity as the administrator of the estate and in his capacity as the attorney therein, and that he also spent approximately 10 hours representing the sole legatee in resisting a claim of an alleged common-law wife of an alleged illegitimate son and the claim for services, would there be any rule in Probate Court in effect in the month of September, 1949 requiring the individual, Henry H. Pleasant, acting in, let's say, a triple capacity, administrator, attorney for the administrator, and even going so far as a representative of the sole heir, was there any rule or requirement requiring him to disclose what fees he had received from this estate?

A. No."

Page 281:

"Q. Let me ask you this question, Judge. In September of 1949, where you had a situation involving a sole heir and a relationship of attorney and client existing, did you, as a Probate Judge, concern yourself in the least concerning whatever arrangements were made with relation to fees between the attorney and the client?

A. I certainly would not."

Page 282:

"Q. I will ask you, Judge, whether or not in September of 1949, you having examined today the administrator's account that was filed in this estate as to whether or not there was a fraud committed upon the Probate Court of Cuyahoga County, Ohio on September 23, 1949, when this administrator's final account was filed?

A. I think not."

Page 299:

"Q. You had previously stated that you were concerned as a court with whether or not fees were being charged from the assets of the estate, isn't that true?

A. May I answer this question in this way. Many, many accounts come through with no charge for attorney's fees, and that goes for many big law firms as well as individual lawyers. They collect from the heirs rather than have it spread upon the court's records of how much fees were charged against the estate."

Page 300:

"Q. Judge Brewer, what was the custom in the year 1949, when you were Judge of the Probate Court, with relation to lawyers reporting or not reporting their fees in the final account?

A. Well, the custom was, sometimes it was done and sometimes it wasn't."

Testimony similar to the above given by the Probate Judge, was given by three of his chief deputies. When the Supreme Court of Ohio, in 1958, pronounced a rule regarding the inclusion of attorney fees in administrator's accounts, it was pronouncing a rule which was utterly unknown in 1949 when the petitioner's account was filed. The above quoted testimony of the Probate Judge makes that clear. Surely, it is of the utmost significance that in

the decision in this case in which the rule was pronounced by the Supreme Court of Ohio, not a single other decision even alluding to that rule could be cited by the court.

The petitioner earnestly contends that under such circumstances the court had no right even to criticize or to chastise the petitioner, much less to disbar him, for failing to observe a rule of law, the existence of which was wholly unknown even to the court itself.

THE CONFLICT BETWEEN THE COURT AND THE LEGISLATURE.

The petition ir this case discussed at length the unconstitutional assumption by the Supreme Court of Ohio of legislative power in the enactment of Rule 27 and the nullification of a series of Ohio statutes. The validity of the petitioner's contention in this regard is dramatically illustrated in a decision by the highest criminal court of the State of Oklahoma, the Criminal Court of Appeals. This decision in the case of *Lyles vs. The State of Oklahoma* was rendered on September 3, 1958 after all prior briefs in this case had been completed and filed. The first paragraph of the syllabus in that case stated:

> "The adoption of the Canons of Ethics by the courts did not give the canons force of law. They are nothing more than a system of principles of exemplary conduct and good character. They are recommended to the bench and bar as patterns which, if adhered to, will promote respect for the bar and better administration of justice. They are subject to modification to meet the conditions of changing times in keeping with the constitutional rights of the people."

This most recent pronouncement directly supports the petitioner's contention that the Supreme Court of Ohio

has no right to legislate, particularly where such judicial legislation had the effect of nullifying long-existing statutes.

In this same year, 1958, the Supreme Court of the State of Colorado has issued a similar pronouncement, in the case of *Petition of the Colorado Bar Association*, decided on May 13, 1958 and reported in 325 Pac. 2d 932. That court stated:

Syl. 3:

"The 'adoption' of the Canons of Professional and Judicial Ethics by the Supreme Court did not give them the force and effect of law, for breach of which one could be subjected to disciplinary action."

This issue is directly injected into the case by the statement appearing on page 17 of the respondent's brief:

"Moreover, at the beginning of the hearing before the panel in response to a request by counsel for respondent, the petitioner was advised specifically that he had violated Sections 6, 29, 32 and 38 of the Canons of Professional Ethics."

The Supreme Court of Ohio had similarly, a number of years ago, "adopted" the Canons of Professional Ethics, and incorporated them as one of the rules of the Supreme Court. In this case, as in a prior case, the Supreme Court of Ohio has undertaken to enforce obedience by members of the bar to such canons of ethics as though the canons had in Ohio the force and effect of law.

This enforcement has been undertaken by disciplinary proceedings, notwithstanding the fact that in so doing the Supreme Court of Ohio has indulged in legislation which again nullifies an Ohio state of long standing. This was done in the case of *In Re McBride*, 164 O. S. 419, 132 N. E. 2d 113 (Pet. p. 38), Petition for Writ of Certiorari denied, 351 U. S. 965, 76 S. Ct. 1030.

Revised Code Sec. 4705.02 confers upon the courts of Ohio the right to discipline an attorney "for misconduct or unprofessional conduct in office involving moral turpitude or for conviction of a crime involving moral turpitude." In the case at bar, as well as in the *McBride* case, the Supreme Court of Ohio has undertaken entirely to disregard this requirement of the Ohio statute.

The Supreme Court of Colorado, in the case above cited, *Petition of the Colorado Bar Association*, 325 Pac. 2d 932, has declared:

Syl. 1:

> "A professional license cannot be revoked or disciplinary action taken against an attorney at law merely for a violation of standards of ethics, and to be actionable in disciplinary proceedings conduct complained of must amount to a violation of law, or it must involve moral turpitude or dishonorable conduct."

In issuing this pronouncement, the Supreme Court of Colorado has simply stated that to be the law which was incorporated by the Ohio Legislature many years ago in the provisions of what is now Revised Code Section 4705.02.

The evidence in this case discloses beyond a doubt that there was no moral turpitude involved in the conduct of the petitioner in failing to comply with a rule of law which he did not even know existed. Here, again, there is in this case the fundamental conflict between the right of the Legislature and the right of the Supreme Court in Ohio to regulate and to govern the conduct of the petitioner as a member of the bar. Only this Court, and no other, can resolve this fundamental conflict and it is a conflict which one day must be resolved.

For the many reasons advanced, the petitioner respectfully urges that the petition for a writ of certiorari in this case be granted.

Respectfully submitted,

EDWIN F. WOODLE,
Keith Bldg., Cleveland, Ohio,
WILLIAM J. CORRIGAN,
Williamson Bldg., Cleveland, Ohio,
CHARLES J. SMITH,
Leader Bldg., Cleveland, Ohio,
Attorneys for Petitioner.